Supreme Court, U.S.
FILED

011799 JUN - 6 2002

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

CENTRAL PINES LAND COMPANY; TOWER MINERALS COMPANY, INC.; JACK E. LAWTON, JR.; EVELYN GAY LAWTON DUHON; LINDA LEW LAWTON DROST; D, S & T, INC; and DROST & BRAME, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA; TEXACO EXPLORATION AND PRODUCTION INC.; SWIFT ENERGY COMPANY; CHESAPEAKE OPERATING, INC.; C. H. C. GERARD; and RME PETROLEUM COMPANY,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KIM G. MAYHALL
THOMAS C. McKOWEN, IV
Strain, Dennis, Mayhall & Bates, L.L.P.
318 St. Charles Street
Baton Rouge, LA 70802
(225) 343-0100

A. J. GRAY, III
Counsel of Record
The Gray Law Firm, PLC
P. O. Box 1467
Lake Charles, LA 70602
(337) 494-0694

THAD D. MINALDI
101 N. Huntington Street
Sulphur, LA 70663
(337) 527-5221

Attorneys for Petitioners

128pg

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

QUESTIONS PRESENTED FOR REVIEW

1. Where the United States has simply substituted itself for others as successor to rights governed by state law (by acquiring land subject to an outstanding mineral servitude) are the legal relations between the United States, as landowner, and the owner of the previously existing mineral servitude governed by state or federal law?

2. If federal law can properly be applied in such situation, can a "significant conflict between some federal policy or interest and the use of state law" be found to exist without either the identification of a specific objective of the federal program frustrated by the state law or the introduction of any evidence of the asserted federal policy or interest?

3. Can summary judgment be granted based on a finding that there is a federal interest in "potential prescription" and thereby a significant conflict with a subsequent state law ending the running of such prescription (statute of limitations), without the introduction of evidence of the existence of such interest and despite the introduction of evidence which would tend to establish the lack of such interest?

CORPORATE DISCLOSURE STATEMENT

1. William B. Lawton Company, Inc., is the parent company of Tower Minerals Company, Inc.

2. Jack Lawton, Inc., is the parent company of Central Pines Land Company.

3. D, S & T, Inc., and Drost & Brame Inc. do not have parent companies.

4. None of the petitioners are owned ten (10%) per cent or more by a publicly held company.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

RELEVANT CONSTITUTIONAL STATUTORY ORDINANCE PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 17

APPENDIX

CIRCUIT COURT OPINION 1a

DISTRICT COURT OPINION 27a

STATUTES 81a

TABLE OF AUTHORITIES

FEDERAL CASES

CAMPBELL V. HOLT, 115 U.S. 620 (1885) 5
CLEARFIELD TRUST CO. V. UNITED STATES, 318 U.S. 363 (1943) 5, 7, 12
KAMEN V. KEMPER FINANCIAL SERVICES, INC., 500 U.S. 90, 98 (1991) 16
NORTH DAKOTA V. UNITED STATES, 460 U.S. 300, 318 (1983) .. 10
O'MELVENY & MYERS V. FEDERAL DEPOSIT INSURANCE CORP., 512 U.S. 79 (1994) ..... PASSIM
UNITED STATES V. BURNISON, 339 U.S. 87 (1950) 11
UNITED STATES V. KIMBELL FOODS, INC., 440 U.S. 715, 728 (1979) 7, 15, 16
UNITED STATES V. LITTLE LAKE MISERE LAND CO., 412 U.S. 580, 599 (1973) 3, 5, 10, 14
UNITED STATES V. NEBO OIL COMPANY, 190 F.2D 1003, 1008-1009 (5TH CIR. 1951) 9
UNITED STATES V. NEBO OIL COMPANY, 90 F.SUPP. 73, 85-92, 97-102 (W.D. LA. 1950) 4
UNITED STATES V. STANDARD OIL CO. OF CALIFORNIA, 332 U.S. 301, 309 (1947) 6, 9
WALLIS V. PAN AMERICAN PETROLEUM CORP., 384 U.S. 63, 68 (1966) 12

STATE CASES

DE ARMAS V. DE ARMAS ET AL., 3 LA. ANN. 526 4
FROST-JOHNSON LUMBER CO. V. SALLING'S HEIRS, 150 LA. 756, 91 SO. 207 (1920) 3
HICKS V. CLARK, 225 LA. 133, 72 SO.2D 322 (1954) 8
LEITER MINERALS, INC. V. CALIFORNIA CO., 241 LA. 915, 932, 132 SO.2D 845, 848 (1961) 3
SHREVEPORT LONG LEAF LBR. CO., INC. V. WILSON ET AL., 195 LA. 814, 197 SO. 566 4
STATE V. ALDEN MILLS, 202 LA. 416, 12 SO.2D 204 4
WHITNEY NATIONAL BANK V. LITTLE CREEK OIL CO., 212 LA. 949, 958, 33 SO.2D 693, 696 (1947) 4, 9

FEDERAL STATUTES

28 U.S.C. § 1254 2
36 STAT. 961 (1911) 2

STATE STATUTES

LA. R.S. 31:149 2
LA. R.S. 31:149, 149.1, 149.2, 150 3
LA. R.S. 31:149.1 2
LA. R.S. 31:149.2 2
LA. R.S. 31:150 2

IN THE
SUPREME COURT OF THE UNITED STATES

CENTRAL PINES LAND COMPANY; TOWER MINERALS COMPANY, INC.; JACK E. LAWTON, JR.; EVELYN GAY LAWTON DUHON; LINDA LEW LAWTON DROST; D, S & T, INC.; and DROST & BRAME, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA, TEXACO EXPLORATION AND PRODUCTION INC.; SWIFT ENERGY COMPANY; CHESAPEAKE OPERATING, INC.; C. H. C. GERARD; and RME PETROLEUM COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Central Pines Land Company, Tower Minerals Company Inc; Jack E. Lawton, Jr.; Evelyn Gay Lawton Duhon; Linda Lew Lawton Drost; D, S & T, Inc.; and Drost & Brame, Inc., Petitioners, respectfully pray that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 274 F.3d 881, and is reprinted in the appendix hereto at 1a. The decisions of the United States District Court for the Western District of Louisiana are not reported. They are reprinted in the appendix hereto at 27a.

JURISDICTION

The Fifth Circuit issued its decision on November 28, 2001. A timely petition for rehearing was denied on March 8, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The statutes involved in this case are set out in the appendix hereto at 81a because of their length. Such statutes are Weeks Forestry Act, chs. 181-187, 36 Stat. 961 (1911), as amended; La. Act 315 of 1940; La. Act 278 of 1958; La. R.S. 31:149; La. R.S. 31:149.1; La. R.S. 31:149.2; La. R.S. 31:150.

STATEMENT OF THE CASE

S. H. Fullerton acquired a mineral servitude affecting approximately 100,000 acres in Vernon Parish, Louisiana, in 1929 (the "1929 Servitude"). This mineral servitude affected the lands referred to in the lower courts as Group A and Group B lands, which lands are the subject of this writ application. In four transactions between 1933 and 1938, the U.S. Forest Service acquired said lands pursuant to the Weeks Forestry Act. In each transaction, the United States acquired the lands specifically subject to the outstanding 1929 Mineral Servitude. Neither S. H. Fullerton nor his successors were a party to any of these transactions. Through various conveyances, the 1929 Mineral Servitude became owned by petitioners, Central Pines Land Company, Tower Minerals Company, Inc., Jack E. Lawton, Jr., Evelyn Gay Lawton Duhon, Linda Lew Lawton Drost, D, S & T, Inc., and Drost & Brame, Inc.

Under Louisiana law, minerals are not owned as a separate, perpetual estate in land, as in other states, but can only be owned separate from the land as a mineral servitude (similar to an easement under common law). ***Frost-Johnson Lumber Co. v. Salling's Heirs***, 150 La. 756, 91

So. 207 (1920). A mineral servitude in Louisiana, like other servitudes, is perpetual, but is subject to termination if not used for any ten year period, referred to as the prescription of non-use. *Id.* The Louisiana rule of prescription of non-use is, like most statutes of limitation, based upon a legislatively established presumption of abandonment.

By Act 315 of 1940, the Louisiana legislature created an exception to this general rule of law by providing that when the United States, or its agencies, acquires land and the mineral rights are therein reserved, or the acquired land is transferred subject to pre-existing mineral rights which are still in effect, such mineral rights shall not be subject to loss by operation of the prescription of non-use. La. Acts 1940, No. 315. A significant force behind the enactment of this legislation was to facilitate federal land acquisitions in Louisiana. ***United States v. Little Lake Misere Land Co.***, 412 U.S. 580, 599 (1973); ***Leiter Minerals, Inc. v. California Co.***, 241 La. 915, 932, 132 So.2d 845, 848 (1961). The benefits of this act were extended in 1958 to listed categories of state agencies and subdivisions. La. Acts 1958, No. 278. The act has subsequently been expanded to extend its benefits to the State of Louisiana itself and all of its agencies, as well as charitable organizations and entities with expropriation authority. La. R.S. 31:149, 149.1, 149.2, 150. By allowing reluctant vendors to reserve minerals in perpetuity, the act lowered the prices which would have to be paid for land. A landowner who might lose his reserved mineral rights by non-use would obviously be demanding of, and entitled to, compensation for his potential loss of mineral rights.

Although it may not be apparent today in the context of the instant dispute over several million dollars in oil and gas revenue, the exclusion of the United States from application of the general rule of prescription was a considerable benefit to the United States in 1940. Before Act 315, the "default rule" of prescription interfered with federal interests by making land acquisitions under the Weeks Forestry Act more difficult and expensive. (For a thorough discussion on the history of land acquisitions under the Weeks Forestry Act in Louisiana and the effect of the

Louisiana rules of prescription relating to mineral rights, see ***United States v. Nebo Oil Company***, 90 F.Supp. 73, 85-92, 97-102 (W.D. La. 1950).) As in that case, the evidence in the record in the instant case clearly establishes that: (a) prior to 1940, the National Forest Reservation Commission's official position was that Louisiana law of liberative prescription did not apply to mineral interests burdening lands acquired under the Weeks Forestry Act; (b) the United States communicated this policy to landowners; (c) prior to 1940, the prescription of non-use relating to mineral interests made land acquisitions in Louisiana more difficult and expensive than in other states; (d) every tract acquired by the United States under the Weeks Forestry Act without mineral rights was acquired after a formal administrative finding that separate ownership of minerals would not interfere with the purposes for which the lands were acquired; and (e) Act 315 of 1940 was passed to clarify the law removing all doubt as to the non-application of rules of prescription to mineral rights burdening lands acquired by the United States.

The Louisiana Supreme Court has ruled that Act 315 of 1940 applies to mineral rights that had not prescribed when the statute became law. As stated by the Court, its ruling was made

> not because there is anything in the terms of the statute to indicate that it was intended to have a retroactive application, but because of the general rule of law established by the jurisprudence of this court that laws of prescription and those limiting the time within which actions may be brought are retrospective in their operation. See *De Armas v. De Armas et al.*, 3 La. Ann. 526; *Shreveport Long Leaf Lbr. Co., Inc. v. Wilson et al.*, 195 La. 814, 197 So. 566, and *State v. Alden Mills*, 202 La. 416, 12 So.2d 204.

Whitney National Bank v. Little Creek Oil Co., 212 La. 949, 958, 33 So.2d 693, 696 (1947). We note that retroactive

application of changes in statutes of limitation (the common law term analogous to the civil law term prescription) have been upheld by this Court. ***Campbell v. Holt***, 115 U.S. 620 (1885). The 1929 Mineral Servitude was still in existence when the act was passed, prescription having been interrupted by drilling operations in 1933, 1938, and 1939. Therefore, pursuant to Act 315, the 1929 Mineral Servitude ceased to be subject to possible termination as a result of the application of state rules relating to the prescription of non-use.

The parties filed cross-motions for summary judgment on the issue whether Act 315 applied to the instant mineral servitude. The respondents other than the United States are mineral lessees of the United States, the validity of whose leases are at issue in this proceeding. We note that previously this case also involved issues of whether the 1929 Mineral Servitude (if it remained subject to prescription) had not prescribed because of the prevention of use thereof by obstacles and of whether several other mineral servitudes created in transfers to the United States after 1940 were rendered imprescriptible by Act 315. These issues are not involved in this writ application. Absent application of Act 315, the 1929 Mineral Servitude would appear to have terminated prior to the institution of this law suit. On the cross-motions, the trial judge ruled, with very little analysis, that Act 315 could not be applied to pre-existing mineral servitudes.

The Fifth Circuit Court of Appeals affirmed, purporting to apply the choice of law analysis set forth in this Court's ***Little Lake*** and ***Clearfield Trust*** decisions to reach the conclusions that federal common law applied, that Act 315 would be rejected as surrogate federal law, and that instead residual Louisiana law would be adopted as federal common law. ***Little Lake***, *supra*, and ***Clearfield Trust Co. v. United States***, 318 U.S. 363 (1943).

The Court of Appeals properly set out the choice of law rule that generally state law should be borrowed as surrogate federal law, but that state law hostile to federal interests should not be adopted. However, the Appeals Court created its own federal interest—one without any supporting

evidence—and one not argued by the United States. This is one of the issues presented: does the purported federal interest found by the Court of Appeals exist?

As pointed out above and as stated by the Court of Appeals, the instant application does not involve a contract to which the United States was a party, as was the situation in ***Little Lake***. Instead, this case involves the exact situation which this Honorable Court found to be not a matter of federal law in the case of ***United States v. Standard Oil Co. of California***, 332 U.S. 301, 309 (1947). This court, while there discussing the ***Clearfield Trust*** doctrine, excluded from the doctrine's scope, albeit by *obiter dictum*, the situation "where the Government has simply substituted itself for others as successor to rights governed by state law." *Id.* This is exactly the present situation.

This then is the other main issue presented. When the United States buys land from one individual, how can the rights of another individual owning a distinct property right–a mineral servitude–be affected? How do the rights of this other owner become subject to federal law?

REASONS FOR GRANTING THE WRIT

This case presents very important choice of law issues determining the applicability of federal common law, which have not been, but should be, settled by this Court. (1) Does federal law apply to the legal relations between the federal government as landowner and the owner of a pre-existing mineral servitude with whom the government has had no privity or dealings of any type? (2) Assuming that federal law does apply to such legal relations, should the normal rule of adoption of state law as surrogate federal law be rejected as to a particular change in state law where the change was intended to benefit the United States, where the change does not interfere with the use of the land under the objectives of the federal program, and where the only adverse effect of the change on the United States is that sixty (60) years later the United States is unable to obtain money from mineral production? (3) This case also involves an important

and related issue in regards to summary judgment. What evidence, if any, is necessary to prove the existence of a federal interest for the purpose of applying federal common law?

The decision of the Fifth Circuit Court of Appeals herein is totally at odds with the federal choice of law analysis set forth by this Honorable Court in numerous decisions, including ***Clearfield Trust Co.***, *supra*, ***Little Lake Misere Land Co.***, *supra*, and ***O'Melveny & Myers v. Federal Deposit Insurance Corp.***, 512 U.S. 79 (1994). Creation of a special federal rule is "limited to situations where there is a 'significant conflict between some federal policy or interest and the use of state law.'" *Id.* at 87. Where no such federal interest exists, the analysis is at an end and state law must be applied. The Court of Appeals did not adopt any federal interest asserted by the United States, but instead intellectually conceived an interest, which by definition would be in conflict with a particular state law, and then used such created interest to invalidate that state law. No evidence was introduced to support the existence of the purported interest. The Court of Appeals failed to even point to a single provision in the Weeks Forestry Act or policy thereunder which would be frustrated or undermined by application of Act 315 to a pre-existing mineral servitude. *See* ***United States v. Kimbell Foods, Inc.***, 440 U.S. 715, 728 (1979). The "interest" is simply an interest in "more money," an "interest" which has been uniformly rejected. ***O'Melveny & Myers***, *supra*, at 88.

The issue of when federal common law is properly created potentially affects all law suits between individuals and the United States, not only those law suits concerning the ownership of mineral servitudes on over 435,000 acres of federal land in Louisiana which will be directly impacted by the ruling herein. The rationale in the Court of Appeals ruling will wreak enormous havoc in law suits between individuals and the United States, suggesting that the United States may pick and choose whatever law is more favorable and change the applicable law as its interests change over time, as its interests have changed here, from the 1930's till the present—from acquiring land more cheaply, to receiving oil and gas

revenues. By removing the requirement of a contractual relationship, the reach of federal common law becomes limitless. In disputes with the United States, no one will be able to determine the applicable law if this decision is allowed to stand.

The Court of Appeals admitted that there was no contractual relationship between the United States and the owners of the pre-existing mineral servitude. However, it found that there was "a federal interest in the potential prescription of the mineral servitude conveyed by the 1929 deed via the rule of prescription in place at the time of contract," which interest resulted in the application of federal common law to the rights arising under this servitude created between private individuals. Slip op. at 11-12. Despite its purported reliance on ***Little Lake***, the Court of Appeals extended the application of the doctrine of federal common law far beyond ***Little Lake*** or any other prior decision of this Court. It is unclear whether this finding was factual and based upon the summary judgment evidence presented or whether this finding was made as a matter of law. As we will show hereinafter, no such federal interest exists, under either reading.

However, even if one assumes there were a federal interest, the Court of Appeals has failed to establish, or even point out, how federal law became applicable to rights acquired by the United States under a previously existing agreement between private individuals.

A. Federal Common Law Does Not Apply to a Contract Between Private Individuals

When it bought the land, the United States acquired no contractual rights in the minerals. In fact, it obtained no rights whatsoever in the minerals as a matter of state law. It acquired only a hope or expectancy in acquiring the minerals, an item which cannot be legally bought or sold, the existence of which relied solely upon a state rule of law, which the legislature was free to change at any time. ***Hicks v. Clark***, 225 La. 133, 72 So.2d 322 (1954); *see also* ***United States v.***

Nebo Oil Company, 190 F.2d 1003, 1008-1009 (5th Cir. 1951) (hereinafter, "***Nebo***, 5th Cir."). Absent the status of a contractual right (as in ***Little Lake***), how does something which is not a "right" under its sole source (state law) become a federal "right"? The Court of Appeals does not even address this point.

The facts in this application are distinguishable from those in ***Little Lake***, where the rights of the United States were created, and clearly set forth, in a contract to which it was a party. The entirety of the decision to apply federal law in ***Little Lake*** rests on there being a transaction between one party and the United States. In the instant case, the transaction was between the United States and a party unrelated to plaintiffs' ancestor. How can a contract affect someone who is not a party? The Court of Appeals also does not address this point.

The United States, by acquiring land subject to outstanding mineral rights, substituted itself for the previous private landowner as to rights governed by Louisiana law—the rights existing between landowner and mineral owner. *Cf.* ***United States v. Standard Oil Co. of California***, *supra*, at 309. On what basis does federal law become applicable? The only authority cited by the Court of Appeals is ***Little Lake***, which is obviously distinguishable as a federal contract case.

Any other land purchaser in the position of the United States would not have a "right" of any type in "potential prescription." *See* ***Whitney National Bank***, *supra*, and the cases cited therein, and ***Nebo***, 5th Cir., *supra*, at 1009-1010, and the numerous cases from this Honorable Court cited therein. On what basis does the federal government and only the federal government have such a "right"? Why should the United States have a "right" in Louisiana law which neither Louisiana nor its citizens have? Why should the United States have a "right" to acquire minerals by prescription in Louisiana, but nowhere else?

It is also unclear upon what basis the United States is entitled to greater non-contractual rights under state law than state citizens when it enters a state and purchases land on the open market in competition with others. The ruling puts the

United States in a better position than other Louisiana landowners owning land subject to outstanding mineral rights. As to other Louisiana landowners, the prescriptive period of non-use could be shortened, lengthened or abolished by the Louisiana legislature (provided the prescriptive period had not run). As to the United States, the period could be shortened but not lengthened or abolished. There is no rational basis for such a distinction, where the only interest of the United States in the outstanding minerals is monetary. That the only federal interest is monetary is obvious. Before acquiring any tract subject to outstanding minerals under the Weeks Forestry Act, the United States made a formal administrative finding that separate ownership of the minerals would not interfere with the purpose for which the land was acquired. In such a situation (where there is no interest in the minerals even arguably based on federal statute), why should the United States have greater rights than others? Obviously, there is no support in present jurisprudence for such greater rights.

In ***Little Lake***, the basis for finding federal common law applicable is stated as follows: "We deal with the interpretation of a land acquisition agreement (a) explicitly authorized, though not precisely governed, by the Migratory Bird Conservation Act and (b) to which the United States itself is a party." ***Little Lake***, *supra*, at 594. This Court has referred to these as the "key factors" in the decision. ***North Dakota v. United States***, 460 U.S. 300, 318 (1983). Obviously, the second factor is not here present—neither plaintiffs nor any of their ancestors-in-title ever entered into a contract with the United States. On examination, the first factor is also not present. There is no explicit authorization in the Weeks Forestry Act to acquire mineral rights which are owned separately from the land. There was no authorization in the Weeks Forestry Act for acquiring mineral rights by the prescription of non-use. In fact, no appropriations existed to acquire mineral rights.

Furthermore, the facts in the instant writ application simply do not involve a "land acquisition . . . arising from and bearing heavily upon a federal regulatory program." ***Little Lake***, *supra*, at 592. The land acquisitions by the Forest

Service are not at issue here. The purported rights of the United States in minerals are the only rights involved. These are rights under Louisiana law—rights which would not exist absent Louisiana law. Such "rights" do not bear heavily, if at all, on the federal regulatory program.

A similar situation was presented in ***United States v. Burnison***, 339 U.S. 87 (1950), where the right asserted by the United States was the state law prohibiting, by inference, California residents from designating the United States as a legatee in a will. The argument was made that the United States had the right to acquire property by all means known to the law, and that state law could not restrict its right to receive a testamentary legacy. The argument was clearly rejected. Federal sovereignty alone is not a sufficient basis for displacing state law. *Id.* at 92. Act 315 in no way impairs the ability of the federal government to acquire minerals in Louisiana under any federal regulatory program, whether by purchase, condemnation, donation, or otherwise.

Act 315 does not act on the power of the United States to acquire minerals; but instead acts on whether the owner of minerals on lands owned by the United States is subject to loss of those rights by a state rule relating to prescription of non-use. In ***Nebo***, it was correctly noted that the Louisiana rule of prescription is based upon the concept of presumed abandonment and that it is within the power of the state to determine when such a presumption should no longer be drawn. ***Nebo***, 5th Cir., *supra*, at 1010. As in ***Burnison***, in this case the United States would have no semblance of a claim to the minerals under the lands in dispute but for Louisiana law, *i.e.*, provisions of Louisiana law relating to implied abandonment and prescription on non-use.

In 1940, when Act 315 was passed, mineral rights clearly did not bear heavily on the forestry regulatory program. The Forest Service itself determined prior to acquisition that acquisition of the land subject to outstanding mineral rights would not interfere with the use of the land as contemplated under the statute. In fact, at that time the National Forest Reservation Commission considered private ownership of minerals to be a benefit to forest land since the mineral owners constructed roads and other improvements

which would aid forest management. The "rights" asserted by the United States herein do not "find their roots in the same federal sources." ***Clearfield Trust***, *supra*, at 366. The source of the purported "rights" is state law. The ***Clearfield Trust*** doctrine does not apply—federal common law is not applicable. Louisiana state law applies of its own force.

B. Federal Common Law May Only Be Applied Where There is a Significant Conflict Between a Genuinely Identifiable Federal Policy or Interest and State Law

Even if ***Clearfield Trust*** and its progeny are applicable, it is clear that the substantive content of federal common law is generally state law unless there is "a significant conflict between some federal policy or interest and the use of state law in the premises." ***Wallis v. Pan American Petroleum Corp.***, 384 U.S. 63, 68 (1966). The cases of this Court "uniformly require the existence of such a conflict as a pre-condition for recognition of a federal rule of decision." ***O'Melveny & Myers***, *supra*, at 87. The creation of federal common law is warranted only in extraordinary cases. Such creation should be tethered "to a genuinely identifiable (as opposed to judicially constructed) federal policy." *Id.* at 89.

Of course, if there were a federal policy or interest in always winning law suits, no state law which would cause the United States to lose a suit would ever be adopted as federal common law. This Court has clearly rejected a federal policy that the federal government should always win, referring to such claims as "more money" arguments and summarily rejecting them. *Id.* at 88. Therefore, pursuant to this Court's numerous rulings, for state law to be displaced, the United States must establish a genuinely identifiable federal policy or interest and also show it to be in significant conflict with state law.

Because the federal interest cited by the Fifth Circuit was not argued by the United States, and is not related to any genuinely identifiable federal policy or interest of the United

States under the Weeks Forestry Act existing in 1940, there can be no doubt that such interest was "judicially constructed," expressly contrary to this Court's admonition in ***O'Melveny***. Also, in the instant case, the federal interest, as postulated by the Fifth Circuit, is in conflict with a state law, but only in regards to mineral servitudes created before Act 315 of 1940 went into effect, not subsequent thereto. No explanation is given as to why the federal interest would change in this fashion.

Default rules of law are in and of themselves as likely to injure the government as to assist it. The default rules in most other states prevent the United States as landowner from acquiring outstanding mineral rights based upon non-use by the mineral owner. Can it really be said that the United States has a significant interest in such laws continuing? It simply makes no logical sense to state that there is an overriding federal interest in "the application of default legal rules in place at the time of contract." Slip op. at 18. Of necessity, there can only be a federal "interest" in some default legal rules—those benefitting the government. Such an interest—an interest in winning—has never been found sufficient to override state law. ***Clearfield Trust*** and ***Little Lake*** require the government to establish that state law conflicts with some significant, specific, concrete federal policy or interest, beyond the obvious interest of the United States in prevailing in law suits and obtaining more money.

In this case, the United States made absolutely no showing that continued private ownership of minerals on lands acquired by it under the Weeks Forestry Act somehow interfered with or undermined the implementation of federal policies relating to the use or management for which the lands were acquired. (Lands acquired under the Weeks Forestry Act were originally purchased to control soil erosion in clear cut forests; later the Act was utilized in connection with New Deal programs providing jobs for local residents working in the national forests.) In fact, the United States attempted such a showing in the trial court but its arguments were rejected so summarily that the arguments were not even urged by the United States on appeal.

The postulated federal interest is quite unusual. It is not an interest in uniformity. The Court of Appeals recognized that under its ruling in most other states the federal common law rule will be different, because the law in most other states is different (perpetual mineral estates are allowed). It explained this strange situation with the terse comment: "the problem . . . [is] the application of default legal rules in place at the time of contract." Slip op. p. 18. The Court, however, never explains why there is, or should be, a federal interest in default legal rules of state law. This lack is especially glaring since, even under the Court's own explanation, such a federal interest is against the monetary interest of the United States in forest acquisitions in almost every other state, and even in Louisiana after 1940.

We further note that in ***Little Lake***, this Court stated: "Were the terms of the mineral reservations at issue here less detailed and specific, it might be said that the Government acknowledged and intended to be bound by unforeseeable changes in state law." ***Little Lake***, *supra*, at 602-603. It was hornbook law in 1933 when the United States acquired the lands in question that the United States Constitution did not prohibit a state legislature from retroactively altering rules relating to statutes of limitation (provided no rights had vested under the existing rule). Here the changes in state law were clearly foreseeable. *See* ***Nebo***, 5th Cir., *supra*, at 1007-1008 and 1009-1010, and the numerous cases cited. The United States has not asserted any basis upon which it should not be bound by a change in the law of prescription.

The only explanation for the existence of this unusual interest that comes readily to mind is that the asserted interest in the present case allows the United States to obtain "more money." But as Your Honors have often stated, "there is no federal policy . . . [to] always win." ***O'Melveny & Myers***, *supra*, at 88. As noted above, Act 315 was passed to assist the United States. The United States wants to reap the benefits of the act but avoid one arguably unfair result—a result caused not by the words of the act, but by a general rule of law applicable to all. The United States has not explained why when it is relying on state law, a general concept of such state law should not be applied.

An interest in receiving money is not the type of interest which would result in the application of federal common law pursuant to the ***Clearfield Trust*** analysis. ***O'Melveny & Myers***, *supra*; ***United States v. Kimbell Foods, Inc.***, *supra*. In this sense, the United States may have an interest in the application of default legal rules which increase its income and give it "more money." But neither the government nor the Fifth Circuit has pointed out any other sense in which there is a federal interest in default rules of state law.

If a federal interest in default rules of state law exists, under the Court of Appeals' ruling, it apparently exists only to freeze state law beneficial to the United States. Presumably, state law could still be changed if the United States was benefitted by the change. In this very case, the United States argued (on an issue no longer being contested) that a change in the Louisiana law of prescription in 1974, which arguably benefitted it, should be applied retroactively to the mineral rights at issue. Neither the Court of Appeals nor the United States has explained why the United States should be able to pick and choose which state law should apply in this fashion. To be direct: to allow the United States to do so is simply unfair.

Furthermore, this purported interest has no factual support whatsoever, although it is not at all clear that the Court of Appeals was making a finding of fact. If it were, such decision was clearly erroneous in the context of a motion for summary judgment. The decision could also be read as a ruling that the United States always has a genuinely identifiable interest in default rules of state law. But again, neither the United States nor the Fifth Circuit has presented any rationale for the existence of such a federal interest. This interest was created out of the air, without any reference to any provision of the Weeks Forestry Act which would be frustrated by application of Act 315, and without any reference to how federal policies in general would be frustrated by permitting otherwise valid changes in state law to apply to the United States. As this Court has stated: "federal courts should 'incorporat[e] [state law] as the federal rule of decision,' unless 'application of [the particular] state

law [in question] would frustrate specific objectives of the federal program.'" ***Kamen v. Kemper Financial Services, Inc.***, 500 U.S. 90, 98 (1991), quoting from ***Kimbell Foods***, *supra*, at 728. There is nothing in the Weeks Forestry Act which suggests that a specific objective of the act is to allow the United States to acquire minerals by implied abandonment on the part of the mineral owner. The Court of Appeals did not point to a specific objective of the Weeks Forestry Act which would be frustrated by application of Act 315 of 1940 to pre-existing mineral servitudes. There are none.

If the ruling is viewed as one of fact, the evidence introduced does not establish the existence of such an interest as an undisputed fact. While the purported federal "interest" may appear reasonable today, the clear and uncontradicted fact is that such "interest" did not exist in 1940 when Act 315 was passed. The actual federal interest was entirely to the contrary. As we have noted previously, the United States took the position during the 1930's that the Louisiana law of prescription did not apply to mineral servitudes burdening lands owned by the United States. Act

[illegible] the federal government and

to clarify the agreement of state and federal law on this issue. Act 315 was not in conflict with any federal interest. In fact, it was in accord with legitimate federal interests. The conclusion by the Court of Appeals that the United States had an "interest" in "obtaining the mineral rights via the default rule of prescription in place before Act 315" is completely contrary to the facts as introduced in this case.

There was simply no evidence introduced which would tend to prove, much less would establish as an undisputed fact, the existence of a federal interest in default rules of law. The Court of Appeals does not point to one shred of evidence to substantiate the existence of such an interest.

The only evidence pointed out by the United States to show any type of federal interest was language in two of the instant land acquisitions purporting to reserve minerals to the landowner and language in an appraisal report prior to an acquisition indicating that the outstanding minerals had been

reserved for ten years. This evidence does not even tend to establish a federal interest in the outstanding minerals as asserted and certainly not a federal interest in default rules of law. At most, it shows that the government placed value on the outstanding minerals and took them into account in its negotiations. At the very least, the evidence introduced by the plaintiffs shows that the existence of a federal interest is not an "undisputed material fact."

Without a federal interest in significant conflict with state law, federal common law cannot be created. ***O'Melveny & Myers***, *supra*, at 87-88. There is no conflict here. Therefore, Louisiana law controls. The purported interest as found by the Court of Appeals does not exist. Louisiana law should apply, as surrogate federal law, if not directly. The only federal interest in conflict with state law is an interest in "more money."

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

KIM G. MAYHALL
THOMAS C. McKOWEN, IV
Strain, Dennis, Mayhall & Bates L.L.P.
318 St. Charles
Baton Rouge, Louisiana 70802
(225) 343-0100

A. J. GRAY, III
Counsel of Record
The Gray Law Firm, PLC
P. O. Box 1467
Lake Charles, Louisiana 70602-1467
(337) 494-0694

THAD D. MINALDI
101 N. Huntington Street
Sulphur, Louisiana 70663
(337) 527-5221

Attorneys for Petitioners

No. 00-31024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CENTRAL PINES LAND CO; TOWER MINERALS COMPANY INC; JACK E LAWTON, JR; EVELYN GAY LAWTON DUHON; LINDA LEW LAWTON DROST; D S & T INC; DROST & BRAME INC,
Plaintiffs-Appellants-Cross-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee-Cross-Appellant,

versus

TEXACO EXPLORATION & PRODUCTION INC; SONAT EXPLORATION CO; CHESAPEAKE OPERATING INC; C H C GERARD; UNION PACIFIC RESOURCES CO,
Defendants-Appellees.

November 28, 2001, Decided

COUNSEL:

For CENTRAL PINES LAND CO, TOWER MINERALS COMPANY INC, JACK E LAWTON, JR, EVELYN GAY LAWTON DUHON, LINDA LEW LAWTON DROST, D S & T INC, DROST & BRAME INC, Plaintiffs - Appellants-Cross-Appellees: Andrew J Gray, III, The Gray Law Firm, Lake Charles, LA. Kim Gregory Mayhall, Thomas Chalmers McKowen, IV, Strain, Dennis, Mayhall & Bates, Baton Rouge, LA. Thad David Minaldi, Sulphur, LA.

For UNITED STATES OF AMERICA, Defendant - Appellee-Cross-Appellant: John A Bryson, John Smeltzer, US

Department of Justice, Environment & Natural Resources Division, Washington, DC.

For TEXACO EXPLORATION & PRODUCTION COMPANY, Defendant - Appellee: David R Dugas, Caffery, Oubre, Dugas & Campbell, Lafayette, LA.

For SONAT EXPLORATION CO, Defendant - Appellee: David B Means, III, Plummer & Means, Mansfield, LA.

For CHESAPEAKE OPERATING INC, Defendant - Appellee: Larry Charles Hebert, Ottinger, Hebert, Sikes & Hebert, Lafayette, LA. Raymond B Roush, Chesapeake Operating Incorporated, Oklahoma City, OK.

For C H C GERARD, Defendant - Appellee: David Baer Klotz, Bodenheimer, Jones, Klotz & Simmons, Shreveport, LA.

For UNION PACIFIC RESOURSES, CO, Defendant - Appellee: Edwin Christian Laizer, Adams & Reese, New Orleans, LA.

JUDGES:
Before HIGGINBOTHAM, BARKSDALE, and STEWART, Circuit Judges.

OPINION BY:
PATRICK E. HIGGINBOTHAM

OPINION:

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The law of mineral rights in Louisiana differs from that of common law states. In Louisiana, these rights do not exist as a separate, perpetual estate in land, but can only be held separate from the surface land in the form of a mineral servitude.[1] The servitude gives its holder the right to enter the property and extract the minerals.[2] Louisiana law has consistently recognized that a mineral servitude may expire, or prescribe, after 10 years of non-use.[3] While parties cannot

contract to extend the prescriptive period, they may shorten the term of the servitude.[4]

Louisiana Act 315 of 1940 created a special rule for prescription of mineral servitudes when the surface property is owned by the United States:

> When land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies from any person, firm, or corporation, and by the act of acquisition, order, or judgment, oil, gas or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas, or other minerals or royalties, still in force and effect, the rights so reserved or previously sold shall be imprescriptible.[5]

The current form of Act 315 extends this treatment of the United States to the State of Louisiana and its subdivisions.[6]

Today we deal with the applicability of Act 315 to certain privately-held mineral servitudes on land now owned by the United States in Vernon Parish, Louisiana. Appellants sought declaratory relief and to quiet title in the servitudes when the United States began leasing mineral rights on this land.[7] The holders of the mineral servitudes appeal the district court's grant of summary judgment in favor of the United States, holding that Act 315, as a matter of federal common law, cannot be applied retroactively to prevent prescription of mineral servitudes when the United States obtained the surface estate before 1940. The United States cross-appeals the district court's grant of summary judgment applying Act 315 prospectively, rendering mineral servitudes imprescriptable if the United States obtained the surface estate after the adoption of Act 315. We conclude that summary judgment was appropriately granted in both instances and affirm.[8]

I

In 1929 Gulf Lumber Company conveyed to S.H. Fullerton mineral rights in a 100,000 acre tract located in Vernon Parish, Louisiana. This created a mineral servitude which was eventually transferred to Wm. T. Burton Industries (Burton). Through a series of later mesne conveyances, Appellants Central Pines Land Co., Tower Minerals Company, Inc., Jack E. Lawton, Jr., Evelyn Gay Lawton Duhon, Linda Lew Lawton Drost, D, S, & T, Inc., and Drost & Brame, Inc. acquired all of the rights of Burton.

The parties have adopted the designations of three parcels of the land as Groups A, B, and C. In four transactions between 1933 and 1938, the U.S. Forest Service acquired the Group A and B lands pursuant to the Weeks Forestry Act.[9] The Forest Service, between 1941 and 1952, granted to the U.S. Army all of the Group A and B lands for use as military training grounds.

Burton acquired complete title to the Group C lands in 1937, thereby terminating the 1929 servitude with respect to these lands. Burton sold those lands to the United States in a series of transactions between 1942 and 1981. In each of these transactions, Burton reserved mineral rights, creating a new mineral servitude. Appellants are the successors in interest to these mineral rights in the Group C lands.

Between 1952 and 1970, the United States, through condemnation, instituted a mineral moratorium which prevented the owners of the mineral servitude from entering portions of the Group A and B lands and exercising their rights. This moratorium did not affect all of the lands burdened by the servitude, although exactly which lands were affected is disputed. In 1967, in an attempt to clarify which lands were covered by the moratorium, the Army and Forest Service divided the land into two areas of "Intensive Use" and "Limited Use." All access was prohibited on Intensive Use land, which was used for artillery practice and as a bombing range. The Limited Use area was under the control of the Forest Service between 1967 and 1978.

During the moratorium Burton was paid a small fee in compensation on a per acre basis for the part of the servitude that was inaccessible for mineral operations. The moratorium was terminated on March 31, 1978. The last drilling on the servitude occurred in 1964 and was performed by Pan American Corporation pursuant to a lease with Burton. Burton's last well was drilled in 1956 and was dry.

In 1992, the U.S. Bureau of Land Management began granting mineral leases allowing exploitation of minerals under Group A and B lands. Appellees Texaco Exploration & Production, Inc., Sonat Exploration Co., Chesapeake Operating, Inc., C.H.C. Gerard, and Union Pacific Resources Co. are the current lessees of these mineral rights. Appellants filed this suit seeking to quiet title to the mineral servitudes on the entirety of the Group A, B, and C lands and a declaration that any leases granted by the United States were invalid. Both parties moved for summary judgment.

The district court granted summary judgment to the Government holding that Act 315 could not be applied retroactively to render the 1929 servitude, which still covered the Group A and B lands, imprescriptible.[10] After determining that the pre-1940 Louisiana law of prescription, with a 10-year prescriptive period, would apply, the district court held that there was no suspension of prescription by obstacle after the moratorium ended in 1978. The district court also held that the moratorium, even when in effect, was not sufficient to suspend prescription because it did not cover all the land subject to the servitude. As a result, the 10-year prescriptive period had run, and the servitude on the Group A and B lands, had prescribed for non-use. The district court also granted summary judgment to Appellants, holding that Act 315 could be applied prospectively to the Group C servitude and that it was therefore imprescriptible.

II

We review the district court's grant of summary judgement *de novo*.[11]

We address first the issue of the applicability of Act 315 both retroactively and prospectively. We reach four distinct

legal conclusions: 1) federal common law governs this decision; 2) Act 315 cannot be borrowed as the rule of decision for application to pre-1940 transactions, because it is hostile to the interests of the United States in the operation of default legal rules in place at the time of contract, but it may be applied prospectively; 3) we will use residual Louisiana law as the federal rule of decision for pre-1940 transfers; and 4) precisely because it is no longer hostile to a federal interest in application of default rules in place at the time of contract, Act 315 can be borrowed as the federal rule for the Group C servitudes. We will explain each conclusion in turn.

A

The parties dispute whether the Supreme Court's decisions in *Clearfield Trust Co. v. United States*[12] and *United States v. Little Lake Misere Land Co.*[13] require application of federal common law to this case. We are persuaded that *Little Lake* controls and that federal common law must both govern the choice-of-law determination and supply the rule of decision.

When a federal court sits in diversity, *Erie R.R. Co. v. Tompkins*[14] requires the application of state substantive law absent a congressional grant of authority to fashion federal common law. This principle applies to other statutory grants of jurisdiction, such as *28 U.S.C. § 1346*(f),[15] upon which the district court's jurisdiction rested in this case, though in actual practice with less force. Rejecting a narrow view of *Erie* and the Rules of Decisions Act,[16] the Supreme Court has held that even without an explicit statutory grant of authority, the fashioning of federal common law may still be appropriate when duties and rights of the United States are at issue.[17] After all the Rules of Decisions Act itself ends with the qualifying phrase "in cases where [state laws] apply."[18] *Little Lake* recognized that federal common law governed when a transaction of the United States "aris[es] from and bear[s] heavily upon a federal regulatory program."[19] Factual similarity between *Little Lake* and this case counsels us to pause and explore *Little Lake* in detail.

In *Little Lake*, the United States sued to quiet title in two adjacent parcels in Cameron Parish, Louisiana that it

acquired under the Migratory Bird Conservation Act.[20] Both parcels were obtained by the United States before Louisiana adopted Act 315. While no mineral servitude existed before the Government acquired these parcels, in both the 1937 act of sale and the 1939 judgment of condemnation, the "seller," Little Lake Misere, *reserved* mineral rights.

In the transactions at issue in *Little Lake*, the default prescriptive period of 10 years was shortened by the terms of the reservation. The mineral servitudes were to continue

> ... as long [after an initial ten-year period] as oil, gas, sulphur, or other mineral is produced ... or so long thereafter as [Little Lake] shall conduct drilling or reworking operations thereon with no cessation of more than sixty (60) days consecutively until production results; and, if production results, so long as such mineral is produced.[21]

Furthermore, if the initial ten-year period ended and no production was occurring, or if operations subsequently ceased for more than 60 days, it was provided that

> the right to mine, produce and market said oil, gas, sulphur or other mineral shall terminate ... and the complete fee title to said lands shall thereby become vested in the United States.[22]

The result of this language was that after 10 years had elapsed from the date of the transfer, any 60 day period of non-production would terminate the mineral servitude.

Little Lake Misere argued that state law should apply and therefore that Act 315 rendered the mineral servitudes imprescriptible. This Court agreed, basing our decision on a prior case involving Act 315, *United States v. Nebo Oil*,[23] where we held that retroactive application of Act 315 did not violate, among other things, the Contract Clause of the U.S. Constitution. The Supreme Court reversed, holding that federal law governed the choice-of-law decision and refusing

to borrow Act 315 as the federal rule of decision because the Court found it was "hostile" to the federal interests at stake.[24]

The Court held that application of federal common law was required under *Clearfield Trust* because "the right of the United States to seek legal redress for duly authorized proprietary transactions 'is a federal right.'"[25] The Court explicitly noted that *Little Lake* involved "the interpretation of a land acquisition agreement (a) explicitly authorized, though not precisely governed, by the Migratory Bird Conservation Act and (b) to which the United States is a party."[26]

The parties in this case dispute whether or not there is such a federal right at issue. Central Pines argues that since the servitude in this case was not *created* by the land acquisition agreement, but rather by the 1929 deed between Gulf Lumber and S.H. Fullerton, there is no federal right at issue. The Government points out that Central Pines relies on the presence of the United States as a party to the *acquisition* in order to obtain the benefits of Act 315 but then denies that this participation by the United States (as opposed to the United States being a party to the creation of the mineral servitude) is relevant for the *Clearfield Trust* determination.

Whether or not the United States bargained over the creation of the servitude, the acquisition subject to the existing servitude created a federal interest in the potential prescription of the mineral servitude conveyed by the 1929 deed via the rule of prescription in place at the time of contract.[27] This is evidenced by the bargaining over this "mere expectancy," apparently invalid, whereby the vendor attempted to reserve it to himself rather than let it pass to the United States upon prescription for non-use.[28] Appellants misconceive the thrust of *Little Lake*. While the Court stated that it was interpreting the land acquisition agreement,[29] the parties did not dispute the meaning of the *terms* of the agreement, but rather the application of Act 315 and its effect on the interests of the United States. The same is true here- the parties do not dispute the meaning of the 1929 deed, but instead disagree over the application of Act 315.

Turning to the federal interest at stake in *Little Lake*, we find fundamental similarities. Appellants insist that the federal right at issue in *Little Lake* was a contractual right of the United States. True, but a contractual right to what? The term at issue in *Little Lake* in effect set the prescriptive period for the reserved mineral servitude. The Government's contract "right" was to obtain the mineral rights after the *contractual* prescriptive period had elapsed. Similarly, in this case the Government's right is to obtain the mineral rights after the *default* prescriptive period has elapsed. This right, as in *Little Lake*, is federal–though arguably weaker because it arises from a default rule.

Appellants urge us to find that *Little Lake* did not overrule our prior decision in *Nebo Oil*, and that *Nebo Oil* held that Act 315 may be retroactively applied to mineral servitudes such as these, where the United States was not a party to the creation of the servitude. However, *Nebo Oil* holds only that the "mere hope" or "expectancy" in the prescription of mineral rights is not protected by the Contract Clause of the U.S. Constitution,[30] and that the retroactive application of Act 315 does not violate the Due Process Clause of the Fourteenth Amendment or dispose of United States property in violation of Article IV, Section 3, clause 2.[31] *Nebo Oil* also does not hold that the rights protected by the Contract Clause are coextensive with those federal interests that a) require application of federal common law under *Clearfield Trust* and b) preclude the borrowing of state law as the rule of decision. The Government does not claim that the Contract Clause prohibits Act 315 from being applied retroactively, presumably because our prior opinion in *Nebo Oil* would render such an argument meritless, but instead that *Clearfield Trust* and *Little Lake* foreclose application of Act 315 as a matter of federal common law. Thus, we need not decide that *Nebo Oil* has been implicitly overruled by *Little Lake* en route to finding that Act 315 cannot be applied retroactively to the servitudes at issue under *Little Lake*.

B

Having determined that a federal rule of decision should be fashioned, we must decide whether to borrow state law. We have stated that

> [b]asic considerations of federalism, as embodied in the Rules of Decision[s] Act, prompt us to begin with the premise that state law should supply the federal rule unless there is an expression of legislative intent to the contrary, or, failing that, a showing that state law conflicts significantly with any federal interests or policies present in this case.[32]

Refusing to apply state law is appropriate when national uniformity is required,[33] as well as when state law conflicts with federal interests.[34] The application of state law may in some instances so strongly conflict with federal interests that it can be rejected without further analysis.[35] However, if state law only arguably interferes with federal interests, then the state's interests in application of its own rules must be weighed.[36] This allocation of what is "national" to the preemptive federal order and what is "state" to that domain is the implementing process for maintaining the symmetry of *Clearfield Trust* and *Erie*.

Again *Little Lake* bears most heavily on this analysis. In *Little Lake*, after determining that federal common law should govern the case, the Court decided that Louisiana law could not be borrowed as the rule of decision. Noting that "specific aberrant or hostile state rules do not provide appropriate standards for federal law," the Court held that Act 315 "as applied to a consummated land transaction under a contract which specifically defined conditions for prolonging the vendor's mineral reservation ... deprives [the United States] of bargained-for contractual interests."[37]

Appellants focus upon the Court's repeated reliance on the contractual terms at issue in *Little Lake* to distinguish the facts of this case.[38] The 1933 deed in this case contains no specific mineral reservation and merely states that the United

States takes subject to the 1929 servitude. The 1936 and 1938 transfers were subject to what Appellants allege are invalid attempts by the vendor to reserve the interest in possible prescription of a third-party's mineral rights.[39] Thus, none of the pre-1940 transfers contain specific contractual terms setting the duration of the servitude. In fact, they could not have such terms, because the United States was not contracting with the party that held the servitude.

The *Little Lake* Court described the explicit contractual terms in that case in contradistinction to terms that are "less detailed and specific."[40] The Court noted, in dicta, that without a contractual term setting out the conditions under which the United States would obtain the mineral rights, "it might be said that the Government acknowledged and intended to be bound by unforeseeable changes in state law."[41] Appellants claim that all three of the pre-1940 transactions are "less detailed and specific" than the terms in *Little Lake*. Since the United States was not contracting with the party that held the mineral rights in these transactions, it could not explicitly bargain or contract for the termination of those rights.[42]

Nevertheless, there is a conflicting federal interest–that in obtaining the mineral rights via the default rule of prescription in place before Act 315. Appellants argue that there is no conflict because there is no independent federal interest in acquiring mineral rights by prescription–if there were, then the laws of the remainder of the states, which allow for a separate perpetual mineral estate would be in "conflict" with this federal interest. This misconceives the problem, failing to address it at the proper level of abstraction: the application of default legal rules in place at the time of contract. Appellants' putative parade of horribles about the invalidation of the property law of the states in which perpetual mineral estates are allowed is only a parade.

The federal interest here is arguably not as powerful as the federal right to enforce explicit contractual terms, which was present in *Little Lake*, and therefore this case invites balancing of state and federal interests to determine whether the state rule should apply.[43] An assessment, however, of the

state interests in the retroactive application of Act 315 has already been performed by the Supreme Court in *Little Lake*. The main justification offered for Act 315 is that it was meant to facilitate federal land acquisitions by allowing vendors to retain their mineral rights indefinitely, as they could in other states.[44] The Court noted that this justification has no bearing on retroactive application of Act 315, because an acquisition cannot be facilitated by a law not yet in existence.[45] The Court also rejected the other justifications offered by the Louisiana Supreme Court in its advisory opinion in *Leiter Minerals, Inc. v. California Co.*[46]: subjecting federal mineral interests to Louisiana mineral conservation laws and clarification of the taxability of the mineral interests held by private parties when the United States owned the surface land.[47]

We believe that any state interest in the retroactive application of Act 315 does not outweigh the federal interest in this case. Therefore the borrowing of state law as the federal rule of decision is here inappropriate. We now turn to the content of the federal rule of decision and conclude that, while we may not borrow current Louisiana law in the form of Act 315, residual (pre-1940) Louisiana law should provide the federal rule of decision for pre-1940 transactions.

C

The Court in *Little Lake* concluded that although Act 315 could not provide the federal rule of decision, a decision of whether or not to choose pre-1940 Louisiana law (10-year prescriptive period) or to fashion a new rule of federal common law was unnecessary because the terms of the land acquisition contract controlled.[48] Those express terms limited the length of the servitude.

In this case there are no express terms governing the prescription or termination of the 1929 servitude in the 1933, 1936, or 1938 transfers. As a result, this Court must decide whether to apply residual (pre-Act 315) Louisiana law or to fashion a different rule of federal common law. The nature of the federal interest we have identified requires the selection of residual Louisiana law. Just as the express terms of the contract determined the outcome of *Little Lake*, so should the pre-1940 default rule of prescription provided by

Louisiana law determine the outcome of this case. Thus, a 10-year prescriptive period is the appropriate federal rule of decision.

D

The Government cross-appeals the district court's determination that Act 315 can be applied prospectively to post-1940 transfers. The Government's position is that we should not borrow Act 315 as the federal rule of decision for the post-1940 transfers under our *Clearfield Trust* analysis. Both parties appear to accept that if the choice-of-law decision for pre-1940 application of Act 315 is federal, so is the choice-of-law decision for post-1940 transfers.

An interest in the application of the pre-Act 315 legal rule cannot be in conflict with the prospective application of Act 315. After its adoption, Act 315 provides the background rule that the United States bargained under. Without "significant conflict" between the application of state law and the federal interest asserted, state law should be borrowed as the rule of decision.[49] The only other federal interest on which the Government could rely–the interest in adding funds to the Treasury–has been recognized by the Court to be insufficient.[50] As a result, unless Act 315 is constitutionally infirm, it renders the servitudes on the Group C lands, which were created after 1940, imprescriptible.

III

The Government argues that Act 315 unconstitutionally discriminates against the United States and therefore cannot be applied retroactively *or* prospectively. The district court held that the doctrine of intergovernmental immunity posed no bar to the application of Act 315. While we are sympathetic to the Government's argument, we are foreclosed from considering the constitutionality of Act 315 as discriminatory against the United States by our prior decision in *United States v. Little Lake Misere Land Co.*[51] This decision was reversed by the Supreme Court in *Little Lake*, but the Court did not address our holding that Act 315 was *not* invalid as discriminatory against the United States.[52]

It is well-established in this circuit that one panel of this Court may not overrule another.[53] While easily confused with traditional *stare decisis*, "our rule that one panel cannot overturn another serves a somewhat different purpose of institutional orderliness."[54] This Court stated in *United States v. Kirk*[55] that "[i]t is the practice of this Circuit for three-judge panels to abide by a prior Fifth Circuit decision until the decision is overruled, expressly or implicitly, by either the United States Supreme Court or by the Fifth Circuit sitting en banc."[56] *Kirk* itself demonstrates that our panel opinion in *Little Lake* binds us on the issue of Act 315's alleged discrimination against the United States, despite its reversal by the Supreme Court.[57] In *Kirk*, the defendant argued that a jury instruction, which had previously been approved by this Court in *United States v. Rogers*,[58] was improper. The decision in *Rogers*, however, had been reversed by the Supreme Court on other grounds.[59] Nevertheless, this Court in *Kirk* held that the decision of the *Rogers* panel was still binding, because the Supreme Court had not explicitly or implicitly overruled our panel opinion.[60]

IV

Having concluded that Act 315 cannot be applied retroactively to the transfers of the Group A and B lands, we must decide whether or not the servitudes affecting those lands have prescribed under the residual rule of Louisiana law that allows prescription after 10 years of non-use. Appellants argue that various acts of the United States operated to legally suspend prescription, such that the 10-year period has not run. We are persuaded that no obstacle existed after the moratorium ended in 1978 and that in any event an obstacle must cover the entirety of the land subject to the servitude before it can suspend prescription as a matter of Louisiana law. We therefore affirm the district court's holding that the servitudes on the Group A and B lands have prescribed for non-use.

A

Appellants first claim that the doctrine of *contra non valentum agere nulla cirrut praescriptio*[61] should apply to suspend prescription when the owner of the servient estate

"impedes" or "hinders" the servitude owner's access to the servitude. The Government argues that the controlling provisions of the Mineral Code (formerly of the Civil Code) govern the suspension of prescription by obstacle.

Under Louisiana law, an obstacle will suspend prescription if the servitude owner is "prevented from using [the servitude] by an obstacle that he can neither prevent or remove."[62] This is nearly identical to the corresponding provision of the Civil Code that governed until the adoption of the Mineral Code in 1975.[63] The district court held, and we agree, that since a) the Mineral Code of 1975 generally applies retroactively and b) the two provisions are identical, the Mineral Code should be applied as the law of prescription in this case.[64]

The Louisiana Supreme Court has stated that statutory prescription is an "example" of the doctrine of *contra non valentum*.[65] Nevertheless, Appellants urge that the general Louisiana law of *contra non valentum* be applied as an addition to the statutory and case law on prescription of mineral servitudes. This extension of *contra non valentum* is not supported by the case law cited by the Appellants. In *Plaquemines Parish Commission Council v. Delta Development Co.*,[66] Plaquemines Parish sued to regain title to mineral interests, arguing that they had been wrongfully expropriated by corrupt public officials. The defendants argued that those interests had prescribed under the 10-year period applicable to claims of breach of fiduciary duty. The court invoked *contra non valentem* because the defendants' concealment prevented the plaintiffs from discovering their claim.[67] Similarly, in *Nathan v. Carter*[68] the defendants' fraud and misrepresentation prevented plaintiff from discovering a cause of action for wrongful death. The Louisiana Supreme Court applied *contra non valentem* on these facts.[69] The Appellants present no evidence of fraud, concealment, or bad faith on the part of the Government. *Delta Development* and *Nathan* are therefore inapposite.

B

A look at even an abbreviated chronological account of the use of the servitude persuades us that it has prescribed.

The last active drilling on the servitude land was in 1964 and was performed by Pan American as a lessee of the servitude. The 10-year period of non-use required for prescription of a mineral servitude can be interrupted when the holder of the mineral servitude, in good faith, engages in operations on the land.[70] These operations, however, must be more than mere "[p]reparations for the commencement of actual drilling or mining operations, such as geological or geophysical exploration, surveying, clearing of a site, and the hauling and erection of materials and structures necessary to conduct operations .... "[71] It is undisputed that the Appellants did not interrupt the prescriptive period by drilling at any time after 1964.

An obstacle to the use of a servitude will suspend prescription.[72] Since Appellants present no evidence of use of the servitude since 1964 the only way they can prevail is by demonstrating that an obstacle created by the Government denied them access to the servitude lands for a total length of time of approximately 22 years from March 20, 1964, when Pan American plugged its well,[73] to the filing of this lawsuit in 1996.[74]

The moratorium on entry to the lands comprising the Fort Polk artillery range (most of the Group B lands and 40-50% of the Group A lands) ended on March 31, 1978. In the time since, neither Appellants nor their predecessor, Burton, engaged in any drilling, so they must show that there was some other obstacle that suspended the prescriptive period. Appellants claim that after the moratorium was lifted the U.S. Army instituted a de facto moratorium that prevented them from making use of the servitude, but do not offer sufficient evidence to survive summary judgment on this issue.[75] Burton had notice of the end of the moratorium,[76] and the Army allowed others to enter the lands for the purpose of performing geological surveys, including Shell Oil, which did so on the basis of a permit granted by Burton.

There is also no evidence that Burton or Appellants drilled or even attempted to enter the servitude lands after the moratorium ended. Nor did they request permission to do so from the Army. Shell Oil shot seismic lines on the

servitude lands under a permit from Burton after the moratorium had ended. The record provides us with no evidence that, after the moratorium ended, the United States created an obstacle to use of the servitude lands. Thus, we have no difficulty concluding that Appellants failed to create a genuine issue of material fact on the question of obstacle. As a result, we find that the mineral servitude terminated by prescription at some time before 1996.

C

Even assuming that a de facto moratorium prevented the Appellants from accessing the servitude after 1978, Appellants must still explain why a partial obstacle is sufficient to suspend prescription. The moratoriums (both real and alleged) indisputably did not cover all of the Group A and B lands, but rather most of the Group B lands and 40-50% of the Group A lands. All that remains is to determine Louisiana law on partial obstacles and the suspension of prescription.

In *Hanszen v. Cocke*,[77] the Louisiana Court of Appeals held that litigation over one portion of land subject to a mineral servitude did not suspend prescription of the servitude because other portions of it were still available for exploitation.[78] The litigation in that case is analogous to the alleged de facto moratorium in this case: each forecloses operations on only a portion of the land burdened by the servitude. Appellant replies that *Hanszen* was incorrectly decided and we may refuse to follow an intermediate state appellate court when its decision does not represent the likely result in the state's highest court.[79]

This argument relies on a questionable reading of the Louisiana Supreme Court's decision in *Boddie v. Drewett*,[80] a case overruled ten years later in *Mire v. Hawkins*.[81] In *Boddie* the court held that a drilling order of the Department of Conservation prohibiting drilling on the entirety of a 12 acre tract of land subject to a mineral servitude constituted an obstacle that suspended prescription. The court refused to hold that the drilling of a dry hole in good faith *outside* the tract burdened by the servitude but *inside* the drilling unit constituted use that would interrupt the prescriptive period.[82]

However, this was precisely the theory the court elected to adopt in *Mire*, overruling *Boddie* and declaring that the Department of Conservation's drilling orders could *not* be obstacles that would suspend the prescriptive period.[83] However, operations anywhere within the drilling unit would be a use of the servitude (thus interrupting prescription) even if these operations were not on the tract subject to the servitude.[84] Nothing in *Boddie* or *Mire* explicitly addresses whether or not a partial obstacle is sufficient to suspend prescription.

Appellants, however, argue that one of the holdings of *Boddie* is that a partial obstruction is sufficient to suspend prescription. This can be deduced, they believe, from the fact that the drilling order in *Boddie* only affected certain "sands" (geological formations at particular depths) rather than all sands.[85] Since the *Mire* Court reversed on other grounds (that Department of Conservation orders cannot be obstacles), Appellants argue that this holding of *Boddie* remains good law.

We disagree. The Department of Conservation's order in *Boddie* covered the only useful "sand" under the tract in question, meaning it was not a partial obstacle in any real sense. Moreover, this partial obstacle argument is not addressed by the Louisiana Supreme Court in *Boddie*, and we will not question *Hanszen*'s interpretation of Louisiana law on this basis. Thus, following *Hanszen*, no obstacle sufficient to suspend prescription has ever existed over the Group A and B lands.

We AFFIRM.

Footnotes

[1] *Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207, 245 (La. 1920).*

[2] *Id.*

[3] *See Leiter Minerals, Inc. v. California Co., 241 La. 915, 132 So. 2d 845, 851 (La. 1961)* (citing provisions of the Louisiana Civil Code and case law recognizing the 10-year

prescriptive period). The Mineral Code now governs prescription of mineral servitudes and retains the 10-year prescriptive period. La. Rev. Stat. § 31:21.

[4] *See Leiter Minerals, 132 So. 2d at 852* ("If a servitude is established for 10 years or less, it will remain in force for the time so stipulated regardless of whether it is used by the servitude owner. In such a case no question of prescription arises ....").

[5] 1940 La. Acts 315.

[6] La. Rev. Stat. § 31:149.

[7] Jurisdiction in the district court was based on *28 U.S.C. § 1346*(f), which provides exclusive original jurisdiction to federal district courts for actions under *28 U.S.C. § 2409a* to "quiet title to an estate or interest in real property in which an interest is claimed by the United States." *28 U.S.C. § 1346*(f).

[8] Judge Stewart concurs in the judgment only.

[9] *16 U.S.C. § 515.*

[10] The Louisiana Supreme Court has held that Act 315 should be applied retroactively. *Whitney Nat. Bank v. Little Creek Oil Co., 212 La. 949, 33 So. 2d 693, 696 (La. 1947).*

[11] *Starkman v. Evans, 198 F.3d 173, 174 (5th Cir. 1999).*

[12] *318 U.S. 363, 63 S. Ct. 573, 87 L. Ed. 838 (1943).*

[13] *412 U.S. 580, 93 S. Ct. 2389, 37 L. Ed. 2d 187 (1973).*

[14] *304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).*

[15] *See, e.g., Little Lake, 412 U.S. at 591* ("The federal jurisdictional grant over suits brought by the United States is not in itself a mandate for applying federal law in all circumstances.").

[16] *28 U.S.C. § 1652* ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

[17] *Clearfield Trust, 318 U.S. at 370.*

[18] *28 U.S.C. § 1652.*

[19] *Little Lake, 412 U.S. at 592. See also Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641, 68 L. Ed. 2d 500, 101 S. Ct. 2061 (1981)* (noting that federal common law governs when the "rights and obligations of the United States" are at issue).

[20] *16 U.S.C. § 715 et seq.*

[21] *Little Lake, 412 U.S. at 583.*

[22] *Id.*

[23] *190 F.2d 1003, 1007-10 (5th Cir. 1951).*

[24] *Little Lake, 412 U.S. at 597* (finding application of Act 315 retroactively "plainly hostile to the interests of the United States").

[25] *Id. at 593* (quoting Henry J. Friendly, *In Praise of Erie-And of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 410 (1964)).*

[26] *412 U.S. at 594.*

[27] This "interest" is not recognized as a vested property interest as a matter of Louisiana law. *See Nebo Oil, 190 F.2d at 1006-08* (rejecting Contract Clause challenge to Act 315 because such rights are not vested). The Supreme Court held that this was not relevant to the federal choice-of-law determination. *Little Lake, 412 U.S. at 602* ("It is also of no import that, under Louisiana law as it might be articulated in 1973, the United States acquired from respondents only the reversion to a mineral interest of indefinite duration, a 'hope' or 'expectancy' revocable at any time by after-enacted legislation.").

[28] In the 1936 and 1938 transfers, the following language was used: "This sale is made subject to the sale of oil, gas .... Subject to the above mineral sales and rights of any and all persons thereunder [the rights of Burton] there are specifically reserved *to the vendor* [Gulf Lumber Company] for a period of twenty-five (25) years from December 31,

1936, the right to mine ...." Appellants claim that this attempted reversion of the possibility of prescription of the servitude belonging to Burton was invalid. *See infra* note 42.

[29] *Little Lake, 412 U.S. at 594* ("We deal with the interpretation of a land acquisition agreement.").

[30] U.S. Const. Art. I, § 10, cl. 1.

[31] *Nebo Oil, 190 F.2d at 1008.* This Court has examined the constitutionality of Act 315 numerous times, in fact. In the saga of *Leiter Minerals, Inc. v. United States, 329 F.2d 85 (5th Cir. 1964)* (*Leiter Minerals II*), which generated two opinions from this Court, one from the Supreme Court, and an advisory opinion from the Louisiana Supreme Court, we held that *Clearfield Trust* did not require the application of federal common law to a factually indistinguishable dispute about the retroactive application of Act 315. *Id. at 90.* However, the Supreme Court vacated our opinion as moot. *United States v. Leiter Minerals, Inc., 381 U.S. 413, 85 S. Ct. 1575, 14 L. Ed. 2d 692 (1965).* We reaffirmed the holding of *Leiter Minerals II* in *Little Lake, 453 F.2d at 362,* which, of course, was subsequently reversed by the Supreme Court on *Clearfield Trust* grounds. *Little Lake, 412 U.S. at 590-91 n.8.*

[32] *Georgia Power Co. v. Sanders, 617 F.2d 1112, 1115-16 (5th Cir. 1980)* (internal citation omitted) (citing *Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68, 16 L. Ed. 2d 369, 86 S. Ct. 1301 (1966)); see also, Atherton v. FDIC, 519 U.S. 213, 218, 136 L. Ed. 2d 656, 117 S. Ct. 666 (1997)* ("Such a conflict is normally a precondition" to the application of a special federal rule. (internal quotation marks omitted)); *O'Melveny & Myers v. FDIC, 512 U.S. 79, 85-86, 129 L. Ed. 2d 67, 114 S. Ct. 2048 (1994)* ("Our cases uniformly require the existence of such a conflict as a precondition for recognition of a federal rule of decision.").

[33] *See Clearfield Trust, 318 U.S. at 367* (holding that uniform federal rule should apply in action by United States on a guaranty made on a federal check); *United States v. Standard Oil Co., 332 U.S. 301, 305-06, 91 L. Ed. 2067, 67 S. Ct. 1604 (1947)* (selecting uniform federal rule governing

recovery of United States for injury to U.S. serviceman by third-party tortfeasor).

[34] *See, e.g., United States v. Kimbell Foods, Inc., 440 U.S. 715, 718, 59 L. Ed. 2d 711, 99 S. Ct. 1448 (1979)* (holding that state law should be adopted as federal rule for establishing priority between competing federal and private liens since uniform federal rule was not necessary to protect federal interests).

[35] *See Georgia Power Co., 617 F.2d at 1118* (citing *Little Lake, 412 U.S. at 580).*

[36] *Id.* (citing *United States v. Yazell, 382 U.S. 341, 351-53, 15 L. Ed. 2d 404, 86 S. Ct. 500 (1966)* (holding that federal interest in collection of loan must yield to state interest in family law represented by law of coverture)).

[37] *Little Lake, 412 U.S. at 596-97* (citing *De Sylva v. Ballentine, 351 U.S. 570, 581, 100 L. Ed. 1415, 76 S. Ct. 974 (1956)).*

[38] *Id. at 597* (referring to "specifically defined conditions," "bargained-for contractual interests," and "explicit terms"); *see also id. at 602* ("After-the-fact modification of *explicit contractual terms* would be adverse to the United States and contrary to the requirements of the Migratory Bird Conservation Act." (emphasis added)).

[39] *See supra* note 27, *infra* note 42.

[40] *Little Lake, 412 U.S. at 602.*

[41] *Id. at 602-03.*

[42] Appellants ask us to, at a minimum, distinguish the 1933 deed from the others because it does not contain specific language about the fate of the mineral rights after prescription for non-use. The 1936 and 1938 transfers all contain attempted "reversions" by which the surface land owner attempted to reserve the mineral rights in the event of prescription. Appellants allege that this attempt was invalid as a mater of Louisiana law. We do not need to reach any of these questions, as we find that even the 1933 deed, in its contemplation of the existence of mineral rights, is

sufficiently detailed and specific to satisfy *Little Lake*. Since we believe that the federal interest here is comparable to the contractual interest in *Little Lake*, we decline to read the Supreme Court's dicta in *Little Lake* so broadly.

[43] *See Little Lake, 412 U.S. at 599* ("Conceivably, our conclusion might be influenced if Louisiana's Act 315 of 1940, as applied retroactively, served legitimate and important state interests the fulfillment of which Congress might have contemplated through application of state law.")

[44] *Id.*

[45] *Id.*

[46] *241 La. 915, 132 So. 2d 845 (La. 1961).*

[47] *Little Lake, 412 U.S. at 599-601.*

[48] *Id. at 604* ("Neither rule is the law of Louisiana yet either rule resolves this dispute in the Government's favor. The contract itself is unequivocal....").

[49] *See O'Melveny & Myers 512 U.S. at 85-86* ("Our cases uniformly require the existence of such a conflict as a precondition for recognition of a federal rule of decision.").

[50] *United States v. Burnison, 339 U.S. 87, 91-92, 94 L. Ed. 675, 70 S. Ct. 503 (1950).*

[51] *453 F.2d 360 (5th Cir. 1971)* ("As to the contention that Lousiana's Act 315 is hostile to the United States, we note the same principle applies to acquisitions by the State of Louisiana ... and that the act really does nothing more than place citizens of Louisiana in the same position as citizens of other states whose land has been purchased or condemned by the United States. We hold, therefore, that Act 315 is not unconstitutional.").

[52] *Cf. Little Lake, 412 U.S. at 606-08* (Rehnquist, J., concurring) (arguing that Act 315 does impermissibly discriminate against the United States).

[53] *Barrientes v. Johnson, 221 F.3d 741, 780 n.30 (5th Cir. 2000).*

[54] *Montesano v. Seafirst Commercial Corp., 818 F.2d*

423, 425-26 (5th Cir. 1987).

[55] *528 F.2d 1057 (5th Cir. 1976).*

[56] *Id. at 1063. See also Causeway Med. Suite v. Ieyoub, 109 F.3d 1096, 1103 (5th Cir. 1997)* ("Accordingly, for a panel of this court to overrule a prior decision, we have required a Supreme Court decision that has been fully heard by the Court and establishes a rule of law inconsistent with our own.").

[57] In order to hold differently on the issue of Act 315's alleged discrimination against the United States, we would have to overrule *Kirk*, which we cannot do, of course.

This case illustrates the important difference between our treatment of a panel opinion after *vacatur* by the Supreme Court and our treatment when a judgment is reversed on other grounds. While our prior opinion in *Leiter Minerals II* did not bind the *Little Lake* panel because it was *vacated*, the opinion in *Little Lake* binds us because only the *judgment* was reversed on other grounds. *Little Lake, 453 F.2d at 362* (reaffirming principles of *Leiter Minerals II* in face of Government's argument that it had no precedential value); *Ridley v. McCall, 496 F.2d 213, 214 (5th Cir. 1974)* (stating that vacated opinions have no precedential value); *Durning v. Citibank, N.A., 950 F.2d 1419, 1424 n.2 (9th Cir. 1991)* ("A decision may be reversed on other grounds, but a decision that has been vacated has no precedential authority whatsoever.").

[58] *488 F.2d 512 (5th Cir. 1974), rev'd on other grounds, 422 U.S. 35, 41 (1975).* The Supreme Court held that an improper communication between judge and jury had occurred, necessitating reversal. *422 U.S. at 40-41.*

[59] *Rogers, 422 U.S. at 36.*

[60] *Kirk, 528 F.2d at 1063.* The fact that then Justice Rehnquist agreed that Act 315 discriminated against the United States does not change our determination that our opinion in *Little Lake* is still binding. Two justices in *Rogers* concurred and reached the merits of the question, arguing that our decision should be overruled. *Rogers, 422 U.S. at*

43-48 (Marshall, J., concurring).

[61] "Prescription does not run against one unable to act." *See Cartwright v. Chrysler Corp., 255 La. 597, 232 So. 2d 285, 287 (La. 1970).*

[62] La. Rev. Stat. § 31:59.

[63] See La. Civ. Code. art 792 (1870) ("If the owner of the estate to whom the servitude is due, is prevented from using it by any obstacle which he can neither prevent nor remove, the prescription of non-usage does not run against him as long as this obstacle remains.").

[64] *See* La. Rev. State. § 31:214 (stating that Mineral Code is to be applied retroactively unless it would "divest already vested rights, or [] impair the obligation of contracts").

[65] *McDonald v. Richard, 203 La. 155, 165, 13 So. 2d 712 (La. 1943).*

[66] *502 So. 2d 1034 (La. 1987).*

[67] *Id. at 1060-61.*

[68] *372 So. 2d 560 (La. 1979).*

[69] *Id. at 562-63.*

[70] *Mire v. Hawkins, 249 La. 278, 186 So. 2d 591, 595-96 (La. 1966); see also* La. Rev. Stat. Ann. § 31:29(1). Interruption differs from suspension. *See infra* note 74.

[71] La. Rev. Stat. § 31:30.

[72] La. Rev. Stat. § 31:59.

[73] A lessee's use of the servitude suffices to interrupt prescription as against the servitude owner. *Taylor v. Dunn, 233 La. 617, 97 So. 2d 415, 419 (La. 1957).*

[74] An obstacle causes the prescriptive period to be suspended, whereas use of the servitude causes the prescriptive period to be interrupted. The difference is as follows: suspension merely "stops the clock," which begins to run again when the obstacle is removed. Interruption, by contrast, "resets the clock" so that when operations cease, a full 10 years must elapse until prescription. *See Louviere v.*

Shell Oil Co., 440 So. 2d 93, 97 n.8 (La. 1983); La. Civ. Code arts. 3466, 3472. This distinction is not very important to this case, because use (which would constitute an interruption) has not occurred since 1964. Appellants need only to show that obstacles to their (and Burton's) use of the servitude existed over an approximately 22 years in aggregate.

[75] Appellants' main evidence on this point is the impression of one John Camp, an agent of Burton's, that, despite explicit statements to the contrary about whether drilling would be allowed, the Army conveyed the message that "there ain't going to be no drilling on this reservation."

[76] The moratorium payments that had been made by the Army to Burton ended as of March 31, 1978. This provided notice to Burton that use of the servitude would now be allowed.

[77] *246 So. 2d 200 (La. App. 1st Cir. 1971).*

[78] *Id. at 206.*

[79] *Hulin v. Fibreboard Corp., 178 F.3d 316, 328 (5th Cir. 1999).*

[80] *229 La. 1017, 87 So. 2d 516 (La. 1956).*

[81] *249 La. 278, 186 So. 2d 591 (La. 1966).*

[82] *Boddie, 87 So. 2d at 518.*

[83] *Mire, 186 So. 2d at 592.*

[84] *Id.*

[85] *Boddie, 87 So. 2d at 519.*

CIVIL ACTION NO. 96-2000

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

CENTRAL PINES LAND COMPANY, TOWER MINERALS COMPANY, INC., JACK E. LAWTON, JR., EVELYN GAY DUHON, LINDA LEW LAWTON DROST, D, S, & T, INC., AND DROST & BRAME, INC.

Vs.

UNIETD STATES OF AMERICA and TEXACO EXPLORATION AND PRODUCTION INC., SONAT EXPLORATION COMPANY, HELMERICH & PAYNE, INC., and CHESAPEAKE OPERATING, INC.

Filed April 7, 1999

RULING

Before this court is Central Pines Land Company, Tower Minerals Company, Inc., Jack E. Lawton, Jr., Evelyn Gay Lawton Duhon, Linda Lew Lawton Drost, D, S & T, Inc., and Drost & Brame, Inc.'s (hereinafter collectively "plaintiffs") motion for summary judgment. In their motion, plaintiffs ask this court to declare them owners in indivision of mineral servitudes affecting property[1] owned by defendant United States of America ("United States"). In addition, they seek a declaration that the United States has no interest in the minerals and that all mineral leases granted by it are void. Also before this court are defendants United States and C.H.C. Gerard's ("Gerard") motions for partial summary judgment, moving this court to dismiss plaintiffs' complaint "to the extent that it seeks a declaratory judgment that plaintiffs are the true and lawful owners in perpetuity of imprescriptible mineral servitudes."[2] All that stands in the way of the United States, as surface owner, falling heir to mineral servitudes that expire for non-use by the servitude

owner is a 1940 Louisiana statute that prohibits such a result. We are asked to consider the constitutionality of the 1940 statute. For the following reasons, partial summary judgment is GRANTED in favor of the defendants for all transactions entered into by the United States prior to July 31, 1940, the effective date of Act 315 of 1940.[3] Partial summary judgment is GRANTED in favor of plaintiffs for the transactions consummated after 1940.[4] Act 315 applies to the post-1940 transactions.

I. BACKGROUND

The parties essentially agree to the following material facts. All of the lands involved in this litigation are part of a larger tract of land owned by Gulf Lumber Company as of 24 December 1929.[5] By a deed dated 24 December 1929, Gulf Lumber Company conveyed to S. H. Fullerton the minerals under this land.[6] Thus, a mineral servitude was created. By four separate transactions in 1933, 1936 and 1938, the United States acquired from Gulf Lumber Company the property described by the parties as Group A and Group B.[7] The land was acquired under the Weeks Law[8] by conventional deeds and by expropriation.[9] In each of these transactions, the United States acquired the land subject to the previously described mineral servitude conveyed by Gulf Lumber Company to S.H. Fullerton.

On 26 April 1937, Gulf Lumber Company and Fullerton Minerals Company[10] transferred their interests in Group C to William T. Burton, thereby terminating the 1929 mineral servitude by confusion.[11] On that date, Fullerton Minerals Company also conveyed to Burton its mineral interest in the Group A and B lands. Under the Declaration of Takings Act and the Acquisitions of and Expenditures of Land for National Defense Purposes Act,[12] the United States acquired the Group C lands from Burton in eight transactions from 1942 until 1981.[13] In each of these sales or expropriations, the United States reserved the mineral rights to Burton or Burton Industries.[14] Plaintiffs are the successors in title of William T. Burton and Burton Industries.

In 1940, the state of Louisiana enacted a statute which purported to make mineral reservations imprescriptible when the United States is the surface owner. La. Acts 315 of 1940. The statute provides, in part:

> When land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies from any person, firm, or corporation, and by the act of acquisition, order or judgment, oil, gas or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas, or other minerals or royalties, still in force and effect, the rights so reserved or previously sold shall be imprescriptible.

La. Act 315 of 1940. By virtue of this statute and its later amendments, plaintiffs claim ownership of the mineral servitude underlying Groups A, B, and C lands.

The parties agree that the 1929 mineral servitude on Group A and B lands had not been extinguished by the prescription of non-use when the Louisiana legislature enacted Act 315 of 1940. The mineral servitude owners or their lessees exercised their rights in 1933, 1938, and 1939.[15] Therefore, this court must decide two issues: (1) whether Louisiana Act 315 of 1940 may be applied retroactively to affect servitudes created before its enactment and (2) whether Act 315's prospective application to lands owned by the United States of America is constitutionally permissible.

II. ANALYSIS

A. Standard for Summary Judgment

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when

viewed in the light most favorable to the non-movant, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S.Ct. 2505, 2510 (1986) . A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id. at 248, 106 S.Ct. at 2510. In making its determination, the court must draw all justifiable inferences in favor of the nonmoving party. Id. at 255, 106 S.Ct. at 2514. Once the moving party has initially shown "that there is an absence of evidence to support the nonmoving party's case," *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553 (1986), the non-movant must come forward, after adequate time for discovery, with "specific facts" showing a genuine factual issue for trial. Fed. R. Civ. P. 56(e); *Matsushita Electric Ind. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986). "[C]onclusionary denials, improbable inferences, and legalistic argumentation" are not an adequate substitute for specific facts showing that there is a genuine issue for trial. *S.E.C. v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993).

In this case, there is no genuine issue of material fact.[16] True, there are disputes in the quantum of land involved, but these disputes are minor and not material to today's decision. The issue of applicability of Louisiana Act 315 of 1940 to real property transactions presents a question of law. Therefore, the granting of partial summary judgment in this matter is proper.

The court may grant summary judgment as to "all or any part" of a claim. Fed. R. Civ. p. 56(a). The standards and procedures for partial summary adjudication are the same as for summary judgment.

B. Mineral Servitudes in Louisiana and Act 315 of 1940

In Louisiana, a landowner does not own the oil, gas, and other minerals "occurring naturally in liquid or gaseous

form;" instead the owner has the exclusive right to explore and develop his property for the production of minerals.[17] A landowner cannot transfer the mineral estate independent of the surface property. *Leiter Minerals, Inc. v. California Co.*, 241 La. 915, 929, 132 So.2d 845, 850 (La. 1961); *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (La. 1920) . He may convey or lease, however, the right to produce the minerals in the form of a servitude. La. R.S. 31:15 (1989); *Leiter*, 241 La. at 929, 132 So.2d at 850; *Frost-Johnson Lumber Co.*, 150 La. at 780, 91 So. at 215. Ordinarily, if a mineral servitude owner does not exercise the right within ten years of its creation, the servitude is extinguished by the prescription of non-use and reverts to the surface owner.[18] La. R.S. 31:26 (1989); *Leiter*, 241 La. at 929; 132 So.2d at 850; *Frost-Johnson Lumber Co.*, 150 La. At 781, 91 So. at 216.

In 1940, the Louisiana legislature enacted a statute which purported to exempt mineral interest owners, who had dealt with the United States in specified ways, from the ten-year prescription of non-use. La. Act 315 of 1940. When the United States is the surface owner, a mineral servitude held by another person will not prescribe for non-use.

C. The Cases Interpreting Louisiana Act 315

The United States Court of Appeals for the Fifth Circuit first dealt with Act 315 in the 1951 case of *United States v. Nebo Oil Company* ("*Nebo Oil*"). *United States v. Nebo Oil Co.*, 190 F.2d 1003 (5th Cir. 1951) . In 1936 the United States purchased land for inclusion in the Kisatchie National Forest. The private vendor conveyed the lands subject to a previous mineral sale. Id. at 1005. The mineral interest owner, Nebo Oil, never exercised its rights, and the United States brought suit to declare it owner of the mineral interest. *Id.* The Fifth Circuit held that Act 315 retroactively applied to the 1936 conveyance because the United States took "nothing more than a mere expectation, or hope, based upon an anticipated continuance of the applicable general laws" that it would receive the minerals as a result of the prescription of non-use. *Id.* at 1008. The court further stated

that the mere expectancy is not a vested right protected by the United States Constitution. *Id.* The court held that the reserved servitude was imprescriptible and not owned by the United States. *Id.* at 1009.

In *United States v. Little Lake Misere Land Company* ("*Little Lake*"), the United States Supreme Court considered Act 315 and its possible retroactive application.[19] *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 93 S.Ct. 2389 (1973). The United States acquired two tracts of land, one by purchase and the other by condemnation, for a wildlife refuge pursuant to the Migratory Bird Conservation Act. *Id.* at 581, 93 S.Ct. at 2391. The 1937 act of sale and the 1939 judgment reserved to Little Lake the minerals for a period of ten years and continuing thereafter for as long as oil and gas were produced. *Id.* Little Lake did not exercise its right during the first ten years; nonetheless, the company, relying on the imprescriptibility created by Act 315, began alienating the mineral servitude.

In deciding whether Little Lake's mineral servitude was extinguished, the Supreme Court noted that the land acquisition in this case was one "bearing heavily upon a federal regulatory program," the Migratory Bird Conservation Act. Id. at 591, 93 S.Ct. at 2396. Citing *Erie* and *Clearfield Trust.*[20] the Court stated that in the context of a specific constitutional or statutory provision, especially when the United States is involved in a transaction, the "choice-of-law task is a federal task for federal courts." *Id.* The Migratory Bird Conservation Act was silent on whether to choose state or federal law in interpreting acquisition agreements under the Act. The Court decided not to borrow state law in this instance because the law, Act 315, as retroactively applied was "aberrant or hostile" to the interests of the United States. *Id.* at 594, 93 S.Ct. at 2398. Instead, the Court fashioned federal common law and held that Little Lake's servitude prescribed through non-use for ten years. *Id.* at 604, 93 S.Ct. at 2403.

D. The Servitudes Created Prior to 1940

Both parties agree in their Statements of Material Facts that the "1929 mineral servitude"[21] was still in existence on the effective date of Louisiana Act 315 of 1940.[22] The issue is whether Act 315 of 1940 should be applied retroactively to affect the prescription of the 1929 servitude.

1. *Little Lake* Controls the Disposition of the Case

Plaintiffs argue that *Nebo Oil* and the principle of *stare decisis* require this court to hold that the 1929 servitude is imprescriptible. They argue that *Little Lake* did not overrule effectively *Nebo Oil*, because the *Little Lake* facts are easily distinguishable. *Nebo Oil* involved an unrestricted mineral servitude while *Little Lake* concerned a detailed servitude for a term. *Little Lake*, 412 U.S. 580, 93 S.Ct. 2389; *Nebo Oil*, 190 F.2d 1003.

The language of the servitudes in both cases is similar. In *Nebo Oil*, the sale was:

> subject to the sale of all the oil, gas . . . under all of the lands conveyed herein . . . wherein Bodcaw Lumber Company . . . was the vendor, and Good Pine Oil Company, Incorporated, was the vendee . . . . There are also specially reserved by and unto Bodcaw Lumber Company . . . all the oil, gas, . . . for a period of ten years after the expiration of the rights of the said Good Pine . . . . At the termination of the ten (10) years' period, if not extended, or at the termination of any extended period . . . the right to drill for and remove oil and gas and to mine and remove minerals shall terminate, and complete fee in the land become vested in the United States.

United States v. Nebo Oil Co., 90 F.Supp. 73, 79 (W.D. La. 1950) . Similarly, the *Little Lake* deed reserved:

> unto the grantor . . . all oil, gas . . . under said land, together with the right of investigating, exploring . . . which rights shall remain in force for a term of ten (10) years from the date of vesting of title in the United States and as long thereafter as oil, gas . . . is produced from said land, or so long thereafter as grantor shall conduct drilling or reworking operations thereon with no cessation of more than sixty (60) days consecutively . . . . Provided that at the end of said ten-year period of reservation, if not extended as hereinabove provided . . . the right to mine . . . shall thereby become vested in the United States . . .

See Plaintiffs' Exhibit No. 53 to their Motion for Summary Judgment, citing appendix A of Respondent's Brief in the United States' application for writ of certiorari, *Little Lake*, 412 U.S. 580, 93 S.Ct. 2389. Except for *Little Lake's* greater specification in the definition of "cessation" in production, the wording of the two reservations is similar. In fact, the *Nebo Oil* contract is more complicated and detailed in that it attempts to shift an outstanding mineral servitude to the grantor for an additional ten-year term. Therefore, *Little Lake*, not *Nebo Oil*, controls the disposition of this case.

2. This Court Must Fashion a Rule of Law

Pursuant to the Weeks Law, the United States purchased land subject to the 1929 mineral servitude previously conveyed to S.H. Fullerton. The Weeks Law embodies an extant federal regulatory program for the protection and management of a national forest system. See Weeks Law, ch. 181-87, 36 Stat. 961 (1911) (codified as amended at 16 U.S.C. §§ 471-580q (1994)). The statute allowed, among other things, the National Forest Reservation Commission to purchase lands "necessary to the regulation of the flow of navigable streams"[23] and the President of the United States to designate national forests within government reservations.[24]

As in *Little Lake*, the land acquisitions at issue in this suit are ones "arising from and bearing heavily upon a federal regulatory program." See *Little Lake*, 412 U.S. at 591, 93 S.Ct. at 2396. Before this court is the interpretation of deeds or judgments that are explicitly authorized by the Weeks Law and to which the United States is a party.[25] *Id.*, citing *Bank of America National Trust & Savings Association v. Parnell*, 352 U.S. 29, 33, 77 S.Ct. 119, 121 (1956). No provision of the Weeks Law guides this court as to the choice of state or federal law in interpreting federal land acquisition agreements. *Little Lake*, 412 U.S. at 591, 93 S.Ct. at 2396. Therefore, the first prong of the *Clearfield Trust* analysis has been satisfied. *Id.*, citing *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573 (1943). A rule of decision must be fashioned, because the "right of the United States to seek legal redress for duly authorized proprietary transactions is a federal right." *Little Lake*, 412 U.S. at 591, 93 S.Ct. at 2396.

3. State Law Will Not Be Borrowed to the Interpret the 1929 Mineral Servitude

Because the Weeks Law gives no guidance in the choice of law, this court must decide whether to apply state law, Act 315 of 1940. *Id.* at 594, 93 S.Ct. at 2398. In making its decision not to apply state law in *Little Lake*, the Supreme Court stated that Act 315 as retroactively applied should not govern the transaction before the court because "specific aberrant or hostile state rules do not provide appropriate standards for federal law." *Id.* Act 315 was found to be aberrant or hostile in *Little Lake* because retroactive application of the statute deprived the United States of the benefit of the bargain it made with the landowner when it used limited federal conservation resources to purchase the land. *Id.* at 596, 93 S.Ct. at 2399.

The *Little Lake* court noted, however, that "[w]ere the terms of the mineral reservations at issue here less detailed and specific, it might be said that the Government acknowledged and intended to be bound by unforeseeable

changes in state law." *Id.* at 601, 93 S.Ct. at 2401. Three of the four transactions at issue in this case contain mineral reservations that are as detailed, if not more so, as the reservation before the court in *Little Lake.*[26] For instance, in the 1936 conveyance from Gulf Lumber Company to the United States,[27] the reservation states:

> This sale is made subject to the sale of oil, gas . . . under and upon all of the land conveyed herein . . . . Subject to the above mineral sales and rights of any and all persons thereunder there are specially reserved to the vendor herein... for a period of twenty-five (25) years from December 31, 1936, the right to mine and remove all oil, gas, and other valuable minerals deposited in or under said land, in compliance with the rules and regulations prescribed by the Secretary of Agriculture attached hereto and made a part thereof . . . . If at the termination of the twenty-five (25) year period of reservation, it is found that such minerals, oil and gas are being operated for an average of at least 200 days per year during the preceding five (5) year period to commercial advantage, then, and in that event the said right to mine shall be extended for a further five (5) years, but the right so extended shall be limited to an area of twenty-five acres of land square around each well or mine . . . . At the termination of the twenty-five (25) year period of reservation, if not extended, . . . the right to mine shall terminate, and a complete fee in the land become vested in the United States.[28]

This language is indicative also of the specificity of the reservations made in the 1938 warranty deed and the 1938 judgment. The wording of the transactions reflects active bargaining between the parties and is inconsistent with the United States' expectation that the reservations would be

subject to modification by retroactive application of state law. *See id.* at 601, 93 S.Ct. at 2401.

The Weeks Law, as originally enacted, provided that land acquisitions might contain exceptions and reservations. *See* Weeks Law, ch. 186, 36 Stat. 962 (1911) . The statute was later amended to state that the reservations were subject to the rules and regulations prescribed by the Secretary of Agriculture and that the rules should be included in the contract itself. *See* Weeks Law, ch. 145, 37 Stat. 855 (1913) The statute envisioned certainty of contract as evidenced by the requirement that the Secretary's sweeping power of regulation be expressly written and made part of the contract. Therefore, this court is bound to follow the precedent of *Little Lake* and hold that Louisiana Act 315 of 1940 does not apply to the 1929 Servitude.

The parties are bound by the contracts between them to the extent that the contracts comport with usual rules embodied in the ten year prescription of non-use. The ten-year prescription of non-use was applicable when the parties bargained for the provisions in the contract. Thus, this court will apply the prescription of non-use to interpret the pre-1940 transactions.

As for the less specific terms of the 1933 deed,[29] this court can see no reason to differentiate between the parties' expectations when entering into the 1933 contract and the later transactions. The parties envisioned their governance by the ten-year prescription of non-use when they entered into the 1933 contract. To apply retroactively a law that arguably may be interpreted to have discriminated against the federal government at the time it was enacted would alter the terms contemplated by the parties when they entered into the contract. *See Little Lake*, 412 U.S. at 606, 93 S.Ct. at 2404 (Rehnquist, J., concurring). To hold otherwise would subject the contracting parties to piecemeal litigation and uncertainty.

Therefore, this court holds that the servitudes created

or recognized prior to the effective date of Louisiana Act 315 of 1940 are not governed by the Act. Instead, this court applies the ten-year prescription of non-use that the parties implicitly expected to govern their contracts. Partial summary judgment is GRANTED in favor of the United States; further proceedings are needed to determine if the prescriptive period has been interrupted or suspended by actions of either party.

E. The Post 1940 Servitudes

Also at issue in this case are servitudes created in eight transactions from 1942 until 1981 pursuant to the Declaration of Takings Act and the Acquisitions of and Expenditures of Land for National Defense Purposes Act.[30] In each of these sales or expropriations, the minerals were not acquired by the United States but were retained by Burton or Burton Industries. In *Little Lake*, the Court explicitly did not decide the question of whether Act 315 of 1940 could be applied to transactions consummated after 1940. *Little Lake*, 412 U.S. at 599, 93 S.Ct. at 2400.

Unlike the transactions consummated before Act 315's enactment or the discussion in *Little Lake*, there is little sound argument for the proposition that either party expected to be governed by any law other than Louisiana Act 315 of 1940. The law was enacted before the transactions in question occurred. Because the parties would have anticipated Act 315's application to their transactions, the United States presumably benefitted from a lower price than it would otherwise have had to pay had either party contemplated the United States' eventual ownership of the mineral servitude. *See Leiter*, 241 La. at 929, 132 So.2d at 850 (stating that the United States bought land at a relatively low price per acre because of the mineral reservations of the vendors). In other words, the United States chose not to purchase the mineral servitudes and benefitted from this choice by paying a lower purchase price.

The government has had some difficulty in acquiring

Louisiana land, because landowners wished to retain their mineral rights. *See id.* In land acquisitions in most other states, the government does not harbor this concern because mineral estates can be sold or seized separately from the surface rights. *Id.*, *United States v. Nebo Oil Co.*, 190 F.2d 1003, 1005 (5th Cir. 1951). The Louisiana legislature enacted Act 315 of 1940 to facilitate the United States' acquisition of lands for national forests and other purposes. *Leiter*, 241 La. at 932, 132 So.2d at 851, citing *Nebo Oil*, 90 F. Supp. 73, 89 (W.D. La. 1950). This interest as applied prospectively is legitimate and important, and thus, a valid use of Louisiana's power to enact laws concerning the acquisition and transmission of land in this state. *See Little Lake*, 412 U.S. at 599, 93 S.Ct. at 2400.

A state law may run afoul of the Supremacy Clause in two ways: it may conflict with an affirmative command of Congress or the law may discriminate against the United States. *See North Dakota v. United States*, 495 U.S. 423, 432, 110 S.Ct. 1986, 1993 (1990). Act 315 does not conflict with either of the statutes under which the United States purchased the land in question. Both of those statutes in general terms authorize the purchase or condemnation of state land for public or military purposes. *See* Acquisitions of and Expenditures of Land for National Defense Purposes, 26 Stat. 316 (1890), as amended by 40 Stat. 24 (1917) and Declaration of Taking Act, 46 Stat. 1421 (1931).

As prospectively applied, Act 315 does not discriminate against the United States in its land acquisitions.[31] Act 315 was preceded by two statutes that applied to acquisitions by the state of Louisiana as well as to those by the United States.[32] Act 315 of 1940 only applied to the United States but was amended in 1958 and 1960 to apply to the State Department of Highways, the State Department of Public Works, levee districts, school districts, and other political subdivisions of the state of Louisiana. *See* Louisiana Act 278 of 1958 and Louisiana Act 528 of 1960. In *Anadarko Production Co. v. Caddo Parish School Board*, Louisiana Act 278 of 1958 was held to apply retroactively to a servitude

created before its enactment and still in existence. *Anadarko Production Co. v. Caddo Parish School Board*, 455 So.2d 699 (La. App. 2d Cir. 1984). Because Act 278 applies retroactively to transactions involving the state, the rule of imprescriptibility has applied simultaneously to the United States and state political subdivisions. The present statute, Louisiana Revised Statutes 31:149, has expanded the number of Louisiana entities to which the benefits of liberative prescription of non-use are inapplicable. See La. R.S. 31:149 (1989).

The United States argues that this court should find Act 315 unconstitutional because it favors private parties. The doctrine that states cannot discriminate against the federal government is referred to as intergovernmental immunity and was first discussed in *McCulloch v. Maryland*, 4 Wheat. 316, 425-437, 4 L.Ed. 579 (1819). *North Dakota*, 495 U.S. at 432, 110 S.Ct. at 1993; 2 Ronald D. Rotunda and John E. Nowak, Treatise on Constitutional Law §. 13.9 (2d ed. 1992) . This constitutional principle has developed primarily in the context of state taxation of federal entities. *See McCulloch v. Maryland*, 4 Wheat. 316, 425-437, 4 L.Ed. 579 (1819) (stating that the "power to tax involves the power to destroy") ; *see also Memphis Bank & Trust Co. v. Garner*, 269 U.S. 514, 46 S.Ct. 172 (1983) (invalidating a discriminatory Tennessee bank tax); 2 Rotunda, *supra*, § 13.9 and cases cited therein. The Court's observation that a law is discriminatory if it treats the private sector better than the federal government must be understood within its historical context. *See* United States' Motion for Summary Judgment, p. 11, quoting *Washington v. United States*, 460 U.S. 536, 544-45 103 S.Ct. 1344, 1350 (1983) (holding that a state tax did not discriminate against government contractors). The Court compares the treatment of the federal government to that of the private sector when dealing with state taxation. In the context of taxation, a state rarely taxes itself, and thus, the only point of comparison for the treatment of the government is the treatment by the state of its private citizens.

A law is not discriminatory solely because it

differentiates between the public and private sectors. In other words, differentiation between parties does not equal discrimination. *See Washington*, 460 U.S. at 544, 103 S.Ct. at 1349. All that is required by the Supremacy Clause is that state laws be "imposed equally on similarly situated" parties. *North Dakota*, 495 U.S. at 435, 110 S.Ct. at 1995. While Act 315 does treat the United States differently from private landowners, it does apply to all government entities identically. Both state and federal vendees who choose not to acquire and pay for a mineral servitude are subject to the same rule: the servitude reserved by the landowner is imprescriptible. Act 315 applies equally to similarly situated entities. *See North Dakota*, 495 U.S. at 435, 110 S.Ct. at 1995.

In *Montana v. United States*, the Court had the chance to address the constitutionality of a state's differentiating between the private sector and the public sector. *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970 (1978). Montana applied a one percent tax on gross receipts earned by contractors on public works jobs; a similar tax did not apply to gross receipts earned by contractors on private works jobs. *Id.* at 147, 99 S.Ct. at 971. The United States challenged the tax as discriminatory. *Id.*, at 151, 99 S.Ct. at 972. The Supreme Court did not address the government's substantive argument, instead holding that the United States was collaterally estopped from arguing discrimination because it was directly involved in litigating the identical issue in state court.[33] *Id.*, at 160, 99 S.Ct. at 977. It reversed the district court's judgment that held the taxing legislation to be unconstitutional.

The district court ruling by a three judge panel, although reversed by the Supreme Court, is instructive. The panel found the tax unconstitutional as applied. *United States v. Montana*, 437 F.Supp. 354 (D. Mont. 1977), *reversed by Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970 (1978). The tax applied both to contractors on federal jobs and to contractors on state jobs who then passed the costs on to the governmental entities for which they worked. In contrast to the federal government, Montana was able to

recoup its costs through the revenue that the tax created. Therefore, argued the district court, the law discriminated against the federal government which was unable to recoup its costs. *Id.*, In contrast, Act 315 of 1940 does not have a "back door" protection of the state of Louisiana. Both governmental bodies are treated identically. The law does not prevent the United States or the state of Louisiana from owning mineral servitudes. The government can purchase the mineral servitude or use their vast expropriation powers to acquire it. Act 315 does prevent the servitude's later acquisition when a governmental entity chooses not to pay for the mineral servitude. The economic burdens possibly created by Act 315 are born alike by similarly situated parties, the state of Louisiana and the United States. *See Washington*, 460 U.S. at 544, 103 S.Ct. at 1349. Therefore, Act 315 as prospectively applied does not violate the Supremacy Clause by discriminating against the United States.

The United States also asserts that Act 315 as applied prospectively is "aberrant and hostile" to "identifiable interests of the federal government." *See* United States' Memorandum in Support of Motion for Summary Judgment, p. 3. The *Little Lake* court in using this language relied heavily on the fact that the case before it concerned a retroactive application of Act 315. See *Little Lake*, 412 U.S. at 594-96, 93 S.Ct. at 2398-99. As discussed previously, prospective application of Act 315 does not deprive the government of the benefit of its bargain. *Id.*, This court assumes that the parties, both sophisticated, were aware fully of the state property law under which they bargained.

Of course, as the defendant argues, Act 315 undermines the control that federal entities have over mineral development, but not any more so than transactions in other states where the government chooses not to purchase the separate mineral estate. The court recognizes the very real issues that befall the managers of the Kisatchie National Forest or the military base as a result of private ownership of the mineral servitudes burdening the land.

It may be more expensive to administer the land when other parties have rights associated with their ownership of the mineral servitude. This sort of incidental cost to the federal government, however, is not unconstitutional. *North Dakota*, 495 U.S. at 438, 110 S.Ct. at 1996. Many state laws may make it more costly for the military or the national forest service to operate their land. *Id.*, The solution for the United States is to pay for the mineral servitude at the time of the transaction or to do so now. Furthermore, this decision cannot create more uncertainty in the management of federal lands than the defendant has been operating under since the *Little Lake* decision in 1973. *See* United States' Memorandum in Support of its Motion for Summary Judgment, p. 19. Therefore, this court holds that Act 315 of 1940 and its amendments govern the transactions occurring after 31 July 1940. The extent, of those interests will be determined in later proceedings.

III. Conclusion

For the foregoing reasons, partial summary judgment is GRANTED in favor of the United States and Gerard for all transactions entered into by the United States prior to 31 July 1940. For the pre-1940 transactions, this court applies the ten-year liberative prescription of non-use. Further proceedings are required to determine if the prescriptive period has been interrupted or suspended by actions of either party. Partial summary judgment is GRANTED in favor of plaintiffs for the transactions consummated after 1940. Act 315 applies to the post 1940 transactions. For both the pre 1940 and post-1940 transactions, additional proceedings may be necessary to determine the precise extent of the parties' interests in the mineral servitudes. The parties are ORDERED to prepare judgments consistent with this ruling.

Alexandria, Louisiana
7 April 1999

F.A. LITTLE, JR., CHIEF JUDGE

UNITED STATES DISTRICT COURT
Footnotes

[1]For convenience of the court, the parties have described the property as Groups A, B, and C as shown on the plat filed as Plaintiffs' Exhibit 56. The legal description of Groups A, B, and C are given in Exhibit A to Plaintiffs' Complaint with the exceptions later noted in the parties' Statements of Material Facts.

[2] *See* Defendant United States' Motion for Partial Summary Judgment, p. 1. Defendant Helmerich & Payne, Inc. ("Helmerich & Payne"), holder of a Bureau of Land Management leasehold interest in the property in question, filed two responses in which it "takes no position on the merits of either and agrees to be bound by the final outcome of this case." *See* Defendant Helmerich & Payne's Response to Plaintiffs' Motion for Summary Judgment, p. 2 and Response to Defendants United States and Gerard's Motions for Partial Summary Judgment. p. 3.

Defendant Gerard filed a motion for partial summary judgment stating that Gerard is aligning with and adopting the position of the United States. *See* Defendant Gerard's Motion for Partial Summary Judgment, p. 2.

For convenience, this court may refer only to the United States when discussing the parties' arguments. Because both Gerard and Helmerich adopted the United States' arguments, all references to the United States alone will include the other two defendants.

[3] In 1940, individual statutes did not bear effective dates. Instead, Section 27 of Article III, Paragraph 1, of the Louisiana Constitution of 1921 stated that all laws shall go into effect on the twentieth day after the legislature adjourns. In 1940, the legislature adjourned on 11 July 1940. Therefore, the effective date of Act 315 is 31 July 1940.

[4]None of the transactions in question occurred in

1940; so the precise date of the Act 315's effective date is not important. For convenience, this court will refer to the 31 July 1940 effective date as "after 1940" or "before 1940."

[5]The United States' Declaration of Material Facts adopts in large part the plaintiffs' Declaration of Material Facts. The exceptions are incorporated by plaintiffs in their Reply to the United States of America's Statement of Material Facts filed 9 November 1998 and their Amended and Restated Statement of Material Facts filed 12 November 1998. The United States disputed a small portion of Plaintiffs' Amended and Restated Statement of Material Facts in its Response filed 27 November 1998. The exceptions are minor and not material to our determination, but they will be noted.

Gulf Lumber Company did not have clear title in full ownership of the E/2 of NE/4, NE/4 of NW/4, and SW/4 of SW/4 of NE/4 of Section 16, T1N-R6W, Vernon Parish, Louisiana, containing 171.44 acres more or less. *See* Plaintiffs' Amended and Restated Statement of Material Facts and the United States' Response to Plaintiffs' Amended and Restated Statement of Material Facts ("United States' Response).

[6] This statement is subject to the following exception as noted in Plaintiffs' Amended and Restated Statement of Material Facts, p. 2, and the United States' Response, p. 2. S. H. Fullerton did not acquire the minerals under E/2 of NE/4, NE/4 of NW/4, SE/4 of SE/4, and Sw/4 of SW/4 of NE/4 of Section 16, T1N-R6W, Vernon Parish, Louisiana. There is also a dispute over whether the Fullerton deed included the W/2 of the NW/4 and the S/2 of Section 20, T1N-R6W, Vernon Parish, Louisiana.

[7]*See supra* footnote 1 for an explanation of the terms Group A, B, and C. This statement is subject to an exception noted in Plaintiffs' Amended and Restated Statement of Material Facts, p. 3, and United States' Response, p. 2. The United States did not acquire the surface to 10 acres in the E/2 of NE/4 of Section 16, T1N-R6W, because these lands

were decreed to be the property of Jesse Weeks in a judgment dated 20 May 1938. In addition, the exceptions noted in footnote 4 also apply to this statement.

[8]*See* Weeks Law, chs. 181-87, 36 Stat. 961 (1911)(codified as amended at 16 U.S.C. §§ 471-580q). The Weeks Law was named after John Weeks, a native of New Hampshire and a congressman from Massachusetts. See Forest Service Management - Field Hearing, Conway, New Hampshire, 1997 WL 16138737 (October 20, 1997)(testimony of Ned Therrien).

[9]The four transactions include: a deed dated 29 December 1933 from Gulf Lumber Company to the United States of America, filed and recorded 30 December 1933 under instrument number 112335, Conveyance Book 103, p. 461, Vernon Parish, Louisiana; a deed dated 14 March 1936 from Gulf Lumber Company to the United States, filed 1 April 1936 and recorded 13 April 1936, under instrument number 122195, Conveyance Book 113, p. 281, Vernon Parish, Louisiana; warranty deed dated 31 May 1938 from Gulf Lumber Company to the United States, recorded under file no. 129298, Conveyance Book 123, p. 646, Vernon Parish, Louisiana; and expropriation judgment dated 20 May 1938 in the proceedings captioned "United States v. 161.44 Acres of Land in Vernon Parish, Louisiana," recorded COB 123, p. 548.

[10] By a deed dated 7 May 1930 and corrected, ratified, acknowledged, and confirmed on 20 August 1936, S.H. Fullerton conveyed his mineral interests in the Group A, B, and C lands to Fullerton Minerals Company. This deed was registered in Conveyance Book 89, p. 391 and Book 115, p. 423, Vernon Parish, Louisiana. *See* Plaintiff's Complaint, p. 3-4.

[11]The parties have agreed to exceptions from this statement. Burton did not acquire the SE/4 of the SE/4 of Section 25, T2N-R6W, until 18 April 1939 and the E/2 of the NE/4 and the NE/4 of SE/4 of Section 33, T2N-R7W, until 31 October 1941. They question Burton's acquisition of the SE/4

of SW/4 of Section 16, T1N-R6W; the NW/4 of the NW/4 of Section 27, T1-R6W; NE/4 of SW/4 of Section 18, T2N-R6W; and NW/4 of SE/4 of Section 35, TIN-R6W. Burton acquired the E/2 of NE/4 & NE/4 of SE/4 of Section 33, T2N-R7W, Vernon Parish, Louisiana, to the extent that Gulf Lumber Company had interests in this land.

[12] *See* Acquisitions of and Expenditures of Land for National Defense Purposes, 26 Stat. 316 (1890), as amended by 40 Stat. 24 (1917) and Declaration of Taking Act, 46 Stat. 1421 (1931).

[13]The parties have agreed to an exception from this statement. Seven acres located in the W/2 of NE/4 of SE/4 of Section 32, T1N-R5W, Vernon Parish, Louisiana, are not described in the expropriation proceedings, judgments, or act of sale. Therefore, it is not included in the Group C lands that the United States acquired from Burton or Burton Industries. The parties disagree on whether the expropriation proceeding entitled "United States of America v. 191.67 Acres of Land, More or less, situated in Vernon Parish, State of Louisiana" on 2 January 1943 only included "outstanding" minerals. If it only included outstanding minerals, 26.73 acres would not be part of the Group C lands. In addition, lands denoted NWNW, T1N-R6W were included in a declaration of taking but not the judgment so the United States disputes its inclusion in Group C.

The eight transactions include: an expropriation judgment dated 2 July 1942 in the proceedings captioned "United States of America v. 1,222.54 Acres of Land situated in Vernon Parish, Louisiana and the W.l Maddox Estate, and Elias Maddox, et al," recorded COB 143, p. 494, Vernon Parish, Louisiana; an expropriation judgment dated 21 October 1942 in the proceedings captioned "United States of America v. 2,992.23 Acres of Land, More or Less, situated in Vernon Parish, Louisiana, and Johnnie Carlock, et al.," recorded COB 145, p. 187, Vernon Parish, Louisiana; an expropriation judgment and an amended judgment dated 15 May 1943 and 11 October 1943 in the proceedings captioned

"United States of America v. 31,221.07 Acres of Land, More or Less, situated in Vernon Parish, State of Louisiana and Pickering Lumber Corporation, et al.," recorded COB 147, p. 575 and COB 150, p. 423, Vernon Parish, Louisiana; an expropriation judgment dated 6 August 1943 in the proceedings captioned "United States of America v. 51.76 Acres of Land, More or Less, in Vernon Parish, Louisiana and Hillyer Edwards Fuller, Inc., et al.," recorded COB 150, p. 229, Vernon Parish, Louisiana; expropriation judgments dated 2 January 1943 and 6 August 1 943 in the proceedings captioned "United States of America v. 191 .47 Acres of Land, More or Less, in Vernon Parish, State of Louisiana, and Hillyer Edwards Fuller, Inc., Now Heflands, Inc., et al.," recorded COB 148, p.498 and COB 150, p. 233; an expropriation judgment dated 13 October 1943 in the proceeding captioned "United States of America v. 510.44 Acres of Land, More or Less, situated in Vernon Parish, State of Louisiana and the W.I. Maddox Estate, and William T. Burton, et al," recorded COB 150, p.421, Vernon Parish, Louisiana; an expropriation judgment dated 8 March 1944 in the proceeding captioned "United States of America v. 26,390.66 Acres of Land, More or Less, situated in Vernon Parish, Louisiana and Nona Mills Co. Ltd., et al," recorded COB 152, p. 352, Vernon Parish, Louisiana; and a deed dated 14 December 1981 from William T. Burton Industries to the United States of America, recorded under file number 392548, Conveyance Book 558, p. 118, Vernon Parish, Louisiana.

[14] The United States argues that the judgments dated 21 October 1942 and 15 May 1943 excepted the minerals but not specifically to Burton or Burton Industries. See United States' Response to Plaintiffs' Amended and Restated Statement of Material Facts, p. 2.

[15] *See* Plaintiffs' Amended and Restated Statement of Material Facts, p. 4 and the United States' Response, p. 2.

[16] *See supra* the "Background" section that discusses the facts upon which the parties agree.

[17]La. R.S. 31:6 (1989). The legislature did not enact the Louisiana Mineral Code until 1974, but it codified the extensive early jurisprudence on mineral law. Although the Code was not enacted when the majority of these events took place or when Louisiana Act 315 was enacted, many of the same principles apply. *See Frost-Johnson Lumber Co. v. Sailing's Heirs*, 150 La. 756, 91 So. 207 (La. 1920)(holding that minerals are not transferrable independently of the surface).

[18] Other modes of a mineral servitude's extinction include confusion, renunciation, expiration of time for which the servitude was granted, and extinction of the right of the landowner. La. R.S. 31:27 (1989).

[19] In *Leiter Minerals v. California Co.*, retrospective application of Act 315 to a detailed mineral reservation was at issue. *Leiter Minerals v. California Co.*, 352 U.S. 220, 77 S.Ct. 287 (1957). The Eastern District of Louisiana granted the injunction sought by the United States. *Leiter*, 127 F.Supp. 439 (E.D. La. 1954). The Fifth Circuit affirmed. *Leiter*, 224 F.2d 381 (5th Cir. 1955). The Supreme Court remanded to the Court of Appeals with instructions to seek construction of Act 315 from the state courts before proceeding. *Id.* at 229, 77 S.Ct. at 292. The Louisiana Supreme Court rendered a declaratory judgment limited to the general interpretation of Act 315. *Leiter*, 241 La. 915, 132 So.2d 845 (La. 1961). After this interpretation by the Louisiana Supreme Court, the Eastern District of Louisiana and the Fifth Circuit considered the case again. *Leiter*, 204 F.Supp. 560 (E.D. La. 1962) and 329 F.2d 85 (5th Cir. 1964). When the parties settled the suit, the United States Supreme Court vacated the judgment of the Court of Appeals and remanded the case to the district court with instructions to dismiss the complaint as moot. *Leiter*, 381 U.S. 413, 85 S.Ct. 1575 (1965).

[20]*Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938) and *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573 (1943).

[21] This is the mineral servitude created by a 24 December 1929 mineral deed from Gulf Lumber Company to S.H. Fullerton.

[22] *See* Plaintiffs' Amended and Restated Statement of Material Facts, p. 4, and United States' Response, p. 2.

According to the parties, the mineral servitude owners and/or its lessees conducted operations in 1 933, 1938, and 1939 sufficient to prevent the running of the ten year prescription of non-use. Of course, this servitude is subject to the exceptions noted in the "Background" section of this ruling.

[23] *See* Weeks Law, ch.186, 36 Stat. 962 (1911).

[24] *See* Weeks law. ch. 348, 43 Stat. 655 (1924).

[25] Plaintiffs argue that the test articulated in *Little Lake* should not apply to the 1929 servitude, because the United States was not a party to the creation of this servitude. The United States was a party to four transactions in which it recognized the 1929 servitudes. But for the United States involvement, plaintiffs most likely could not make a claim to the mineral servitudes that they do today. Plaintiffs seek to take advantage of the United States involvement in the land acquisition in one context but ask this court to ignore it in another, In addition, the test in *Little Lake* is whether the United States is involved in the "land acquisition agreement," not whether it participated in the creation of the servitude. *See Little Lake*, 412 U.S. at 591, 93 S.Ct. at 2396.

[26] *See supra* for language of mineral reservation at issue in *Little Lake*.

[27] This deed is dated 14 March 1936, filed 1 April 1936, and registered 13 April 1936 under instrument number 122195, Conveyance Book 113, p.281, Vernon Parish, Louisiana.

[28] The validity of the parties's attempt to extend the prescription of non-use for an additional fifteen years is not before this court. The language is only quoted to demonstrate the specificity with which the parties contracted.

[29] The deed dated 29 December 1933 reserved the minerals in general terms, stating "EXCEPTING, However, from this sale, all of the minerals ... in, on or under the lands herein conveyed, as conveyed to S.H. Fullerton ...."

[30] See Acquisitions of and Expenditures of Land for National Defense Purposes, 26 Stat. 316 (1890), as amended by 40 Stat. 24 (1917) and Declaration of Taking Act, 46 Stat. 1421 (1931).

[31]In his concurrence in *Little Lake*, Justice Rehnquist stated that he found Act 315 unconstitutional because it impermissibly discriminated against the federal government. *See Little Lake*, 412 U.S. at 606, 93 S.Ct. at 2404. Act 315 of 1940 did discriminate against the government; at that time, the statute did not apply to the state of Louisiana. Justice Rehnquist did not address Act 315 as prospectively applied to both the United States and the state of Louisiana.

[32]*See* Louisiana Act 68 of 1938 and Louisiana Act 151 of 1938. Act 151 stated in pertinent part: "when real estate is acquired by the United States of America, the state of Louisiana, or any of its subdivisions . . . by the act of acquisition, oil, gas and/or other minerals or royalties are reserved, prescription shall not run against such reservation . . ."

[33]The United States had urged one of its contractors to challenge the tax in state court. Montana, 440 U.S. at 151, 99 S.Ct. at 972. The United States directed and financed the litigation. One month after the state court filing, the government initiated suit in federal district court, but on stipulation of the parties, the case was continued pending the state litigation. *Id.* The Montana Supreme Court upheld the tax. The contractor filed notice of appeal but then abandoned

the appeal.

CIVIL ACTION NO. 2:96-2000

SECTION "A" (JUDGE LITTLE)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

CENTRAL PINES LAND COMPANY, TOWER MINERALS COMPANY, INC., JACK E. LAWTON, JR., EVELYN GAY LAWTON DUHON, LINDA LEW LAWTON DROST, D, S&T, INC., DROST & BRAME, INC.,

-vs-

UNITED STATES OF AMERICA

and

TEXACO EXPLORATION AND PRODUCTION, INC., SONAT EXPLORATION COMPANY, HELMERICH & PAYNE, INC., CHESAPEAKE OPERATING, INC.

Filed July 28, 2000

RULING

Before this court is the United States of America's motion for summary judgment and the plaintiffs' motion to strike two declarations submitted by the government in support of its summary judgment motion. For the reasons that follow the plaintiffs' motion is DENIED and the United States' motion is GRANTED.

I. Background

This case has a long, protracted history. In 1929, pursuant to a warranty mineral deed, the Gulf Lumber Company

conveyed to S.H. Fullerton all oil, gas, and minerals in, on, and under a 100,000 acre tract in Vernon Parish, Louisiana. The original transaction created a mineral servitude that allowed S.H. Fullerton to conduct oil, gas, and mineral exploratory and extraction operations on the land. S. H. Fullerton transferred his interest in the servitude to Fullerton Minerals Company on 7 May 1930. On 26 April 1937, Fullerton Minerals Company in turn conveyed the mineral servitude to William T. Burton by mineral deed. Through a series of later transfers, plaintiffs Central Land Company, Tower Mineral Company, Inc., Jack E. Lawton, Jr., Evelyn Gay Lawton Duhon; Linda Lew Lawton Drost, D, S, & T, Inc., and Drost & Brame, Inc. (hereinafter collectively referred to as plaintiffs)[1] acquired all the rights of Wm. T. Burton Industries through mesne conveyances.

The plaintiffs have delineated three parcels of land, denoted as Groups A,[2] B,[3] and C[4], to describe the property subject to the servitude. We adopt these designations in our discussion. In a series of four separate transactions between 1933 and 1938, the United States Forest Service acquired the Group A and B lands for the Kisatchie National Forest, pursuant to conventional deeds and expropriation under the Weeks Forestry Act, 16 U.S.C. § 515. By a series of letters, Memoranda of Understanding, and special use permits between 1941 and 1952, the Forest Service granted to the Army all of the Forest Service lands within Vernon Ranger District of the Kisatchie National Forest for unrestricted military training purposes. These lands, comprising approximately 36,236 acres, remained subject to the mineral servitude created by mineral deed in 1929 that existed when the United States acquired the land.

From 1950 until 1978, through a series of condemnation proceedings, the United States instituted a mineral moratorium that expropriated the servitude owners' rights of ingress and egress over the surface for the purpose of mineral development. The parties seem to agree that the moratorium affected all of Group B and C lands, but dispute whether ingress and egress was originally prevented over Group A

lands. In 1967 in an attempt to clarify the extent of the mineral moratorium, the Army and the National Forest Service entered into a Memorandum of Understanding, that divided the land burdened by the servitude into two areas, the "Intensive Use Area" and the "Limited Use Area." The Intensive Use Area, comprising Fort Polk artillery range, was used as a military training ground and bombing range and included most of Group B lands and approximately half of Group A lands. The Army denied any access to the Intensive Use Area that was incompatible with the military's mission. The parties dispute whether the government allowed any drilling or preparatory seismic activities in the Limited Use Area, which remained under the administrative control of the Forest Service, between 1967 and 1978. *See* discussion *infra* section III[C] (1).

During the moratorium, Wm. T. Burton Industries was paid a small fee by the government on a per acre basis for the portion of its servitude that was inaccessible as a result of the government's restrictions. The impediment to exploration created by the government's moratorium ended officially on 31 March 1978. *See* United States' Mot. for Summ. J., Ex. 48 (letter dated 31 March 1977 from John Camp, attorney for Wm. T. Burton Industries, to Michael Drost, employee for Wm. T. Burton Industries, acknowledging that Army's moratorium was to end on 31 March 1978); Ex. 55 (letter from Major General William B. Steele to commander, US Army FORSCOM dated 6 June 1977 explaining that moratorium over Fort Polk was to end on 31 March 1978). Plaintiffs assert, however, that the moratorium effectively continued after this date.

Between 1933 and 1956, Wm. T. Burton Industries drilled six wells on the lands burdened by the mineral servitude. Each of these endeavors produced a dry well. Wm. T. Burton Industries abandoned its last well located within Group A lands on 4 January 1956. In 1961, Wm. T. Burton Industries leased the mineral rights underlying the 1929 mineral servitude to Pan American corporation. The lease agreement between the two companies noted the existence of the

government's use restrictions on part of the lands subject to the lease. In 1964, Pan American drilled a well, in Section 4, Township 1 South, Range 5 West which proved to be non-productive. Pan American released the lease to Wm. T. Burton Industries on 30 June 1964.

In 1992, the United States' Bureau of Land Management began granting a series of oil and gas leases to the minerals underlying the surface to Group A and B lands. In 1995, the plaintiffs learned that the United States was claiming ownership to the minerals underlying the Kisatchie National Forest. Plaintiffs filed the instant lawsuit to quiet title to the 1929 mineral servitude on 22 August 1996, seeking a declaration that they still own the servitude and that any leases to the minerals granted by the United States of American are null and void. Subsequently, both parties moved for summary judgment on the issue of whether the servitude lands could have prescribed to the government. On 7 April 1999, this court ruled that Louisiana Act 315 of 1940, which provides that a mineral servitude may not prescribe to the government, does not apply to the Group A and B lands because they were acquired by the United States prior to 1940. We determined that the ten-year liberative prescription period applicable to mineral servitudes would govern the Group A and B lands and reserved judgment on the question of whether the prescriptive period had been interrupted or suspended by the actions of either party. *See* 7 April 1999 Ruling, at 15-19.

On 25 April 2000, the United States filed a motion for summary judgment arguing that the plaintiffs' servitude prescribed for nonuse sometime between 1956 and 1996 and asking the court to find that plaintiffs' servitude had reverted to the ownership of the government. The plaintiffs respond that their right to explore for and capture the minerals underlying the lands owned by the United States is extant and argue that summary judgment is inappropriate because genuine issues of material fact remain as to whether the prescriptive period was tolled by the government's moratorium on mining operations.

II. MOTION TO STRIKE

Subsequent to the filing of the United States' motion for summary judgment, the plaintiffs' submitted a motion to strike the declarations of Gretchen Hunt ("Hunt"), the Zone Forest Geologist on the Kisatchie National Forest, and Delia Jaquette ("Jaquette"), the Leasing Program Manager and Mineral Title Specialist for the Southern Region of the United States Forest Service. In her declaration, Hunt provides a seismic map and accompanying explanatory chart detailing the location, of seismic lines shot over the servitude between 1961 and 1985 by various companies. Jaquette's statement gives the exact parameters of the 1929 mineral servitude and describes what part of the servitude lay within the Limited and Intensive Use Areas. The plaintiffs object to Jaquette's declaration because it was not included in the preliminary witness list submitted by the United States on 31 July 1999 and was filed after the 21 April 2000 discovery deadline. The plaintiffs therefore insist that Jaquette's declaration is inadmissible. The plaintiffs also protest the admission of Gretchen Hunt's declaration on the basis that she is testifying as an expert despite the fact that she never filed an expert report as required by the local discovery rules in effect in the Western District of Louisiana.

The district court has the inherent power to manage discovery in cases pending before the court. *See Degen V. United States*, 517 U.S. 820, 826, 116 S. Ct. 1777, 1782, 517 U.S. 820, 135 L. Ed. 2d 102; *Williams v. New Orleans Public Serv., Inc.*, 728 F.2d 730, 732 n. 4 (5th Cir. 1984). This court therefore has discretion in determining whether to permit the United States to rely on the declarations of Hunt and Jaquette. The United States opposes the motion to strike on the grounds that both witnesses' declarations meet the standards of Rule 56(e) of the Federal Rule of Civil Procedure and therefore should be considered by this court. Rule 56(e) provides in relevant part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such

facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Although Jaquette was not named as a witness in a timely manner, her statements are otherwise admissible under Rule 56(e) because they are made on the basis of her personal knowledge, set forth admissible evidence, and demonstrate that she is competent to testify to the matters stated in her declaration. We therefore find no reason to exclude her declaration. Similarly, contrary to plaintiffs' contentions, Hunt's statements are not based on her opinions as an expert, but instead grounded in her own experience, gleaned from her own research or from her personal review of information given to her by her Forest Service employees, or derived from evidence submitted by plaintiffs own witnesses.[5] This is shown by the portion of her declaration in which she details the step-by-step method by which she developed a map of the survey lines that had been shot over the servitude. See Hunt Decl. ¶ 7. We do not agree, as urged by plaintiffs, that Hunt's declaration is barred by the Civil Justice Expense and Delay Reduction Plan adopted by the U.S. District Court for the Western District of Louisiana, Section III, Para 2(b), which requires that "expert witnesses shall be available for deposition during the two-week period following the discovery cutoff" unless otherwise agreed by the parties. The provision cited by plaintiffs deals with experts to be presented at trial. Hunt's declaration is being used for summary judgment purposes only.

Both Hunt's and Jaquette's declarations enlighten the court about the nature of the land subject to the servitude and enable it to make a more informed decision on the United States' motion for summary judgment. The plaintiffs fail to provide us with a legal reason that prevents us from considering these declarations. We therefore DENY plaintiffs' motion to strike and proceed to determine the merits of the summary judgment motion.

III. MOTION FOR SUMMARY JUDGMENT

A. Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when viewed in the light most favorable to the nonmovant, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986). Where, as here,[6] the nonmovant bears the burden, of proof at trial, the moving party may meet its burden by setting forth proof that disproves an essential element of the nonmovants' case. *See Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1195 (5th Cir. 1986). "'A fact is material if it might affect the outcome of the suit under the governing substantive law.'" *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 480 (5th Cir. 2000) (quoting *United States v. Arron*, 954 F.2d 249, 251 (5th Cir. 1992)). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Anderson*, 477 U.S. at 248; 106 S. Ct. at 2510.

If the moving party meets the initial burden of establishing that there is no genuine issue, the burden shifts to the nonmoving party to produce evidence of the existence of a genuine issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 321, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The nonmovant must go beyond the pleadings and designate specific facts showing the existence of a genuine issue of fact for trial. *See Edwards v. Your Credit, Inc.*, 148 F.3d 427, 431 (5th Cir. 1998). "The nonmovant cannot satisfy his summary judgment burden with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence." *See Wilson Indus., Inc. v. Aviva America Inc.*, 185 F.3d 492, 494 (5th Cir. 1999); *Little v.*

Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). In making its determination as to whether summary judgment is appropriate, the court must draw all justifiable inferences in favor of the nonmoving party. *See Anderson*, 477 U.S. at 255; 106 S. Ct. at 2513.

B. Prescription of Mineral Servitudes Generally

Many states allow for an estate in mineral rights that is separate and distinct from the estate of the surface owner. *See, e.g., Central Oil Co. v. S. H. Shows*, 149 So. 2d 306, 309 (Miss. 1961); *Humphreys-Mexia Co. v. Gammon*, 254 S.W. 296, 299 (Tex. 1923). In contrast, in Louisiana,

> [a] conveyance by a landowner to another of the oil, gas and other minerals on, in and under the land, together with rights of ingress, egress and occupancy for purposes of exploitation, is not a grant or alienation of a title to such minerals in place, but simply creates in the grantee a servitude or right of exploitation or development, prescribable in ten years for non-use, of such minerals and the right to appropriate such minerals as may be discovered and reduced to physical possession.

Frost Lumber Indus. v. Republic Prod. Co., 112 F.2d 462, 465 (5th Cir. 1940) (interpreting Louisiana law on mineral servitudes).

1. Statutory Provisions Governing Prescription of Mineral Servitudes

Under the Mineral Code, a mineral servitude is extinguished by "prescription resulting from nonuse for ten years." La. Rev. Stat. Ann. 31:27(1) (West 2000). Likewise, the pre-Code law provided that a mineral servitude prescribes if it is not used for ten years. *See Louisiana Petroleum Co. v. Broussard*, 135 So. 1, 2 (La. 1931); *see also Leiter Minerals, Inc. v.*

California Co., 132 So. 2d. 845, 931 (La. 1961) ("The mineral servitude established either by sale or by reservation is extinguished by the prescription resulting from non-user of the servitude for 10 years following its creation.").[7] under both the Mineral Code and the law previously in effect, the prescriptive period can be interrupted when the holder of the mineral servitude engages in good faith operations with the reasonable expectation of discovering and producing minerals in paying quantities. *See* La. Rev. Stat. Ann. § 31:29(1) (West 2000); *Mire v. Hawkins*, 186 So. 2d 591, 595-96 (La. 1966); *McMurrey v. Gray*, 45 So. 2d 73, 77-78 (La. 1949). If interrupted, prescription starts to run anew from the last day on which mining or drilling operation are conducted. *See* La. Rev. Stat. Ann. § 31:30 (West 2000). When seeking to show that the prescriptive period has been interrupted, the owner of the servitude has the burden of establishing that he or someone in his name has made timely use of the servitude to prevent the accrual of prescription. *Scott v. Hunt Oil Co.*, 160 So. 2d 433, 435 (La. Ct. App. 2d Cir. 1964)

In addition, the prescriptive period may be suspended, or tolled, if an obstacle prevents the owner from using the servitude. *See* La. Rev. Stat. Ann. § 31:59 (West 2000); *see also* La. Civ. Code art 792 (1870) ("If the owner of the estate to whom the servitude is due, is prevented from using it by any obstacle which he can neither prevent nor remove, the prescription of non-usage does not run against him as long as this obstacle remains.").[8] The servitude owner must actually attempt to use the servitude and be denied access before an obstacle is deemed to exist. *See Perkins v. Long-Bell Petroleum Co.*, 81 So. 2d 389, 393-94 (La. 1955). When a servitude is extinguished by prescription, the mineral interest passes to the owner of the surface of the subject property at the time the servitude prescribes. *See McDonald v. Richard*, 13 So. 2d 712, 714-15 (La. 1943)

2. Case Law Interpretation of Statutory Provisions Governing Prescription

According to the plaintiffs, the government's moratorium on

use of the Fort Polk artillery range created an obstacle that suspended the prescriptive period over the entire servitude between 1956 and 1996. They argue that under the maxim *contra non valentem agere nulla cirrut praescriptio*,[9] prescription is suspended if the servitude owner is "effectually prevented" from accessing the servitude by actions of the defendant that "hinder" or "impede" the plaintiffs' access even a portion of the servitude. The United States protests the plaintiffs' interpretation of Louisiana law and argues that according to case law precedent, the prescriptive period was not suspended in this case because at all times a section of the servitude remained available for drilling operations. We agree.

Contra non valentem is a judicially-created exception to the general rule of prescription.[10] The cases cited by plaintiff in support of the application of contra non valentem in this case do not lead to the conclusion urged in their brief. In *Plaquemines Parish Comm'n Council v. Delta Dev. Co.*, 502 So. 2d 1034, 1054 (La. 1987), Plaquemines Parish attempted to regain title to certain mineral interests on the basis that the interests were wrongfully secured by public officials for their own personal gain. *See id.* at 1036. The defendants, successors to the public officials, argued that any claim by the Parish to the mineral interests had prescribed under the ten-year prescriptive period applicable to claims for breach of fiduciary duty, La. Civ. Code Ann. art. 3499. The court applied *contra non valentem* and determined that where the defendants' acts of concealment "effectually prevented" the plaintiffs from discovering that they had a claim against the defendants, an obstacle existed that suspended the prescriptive period. *See id.* at 1037.

Similarly, in *Nathan v. Carter*, 372 So. 2d 560 (La. 1979), the Louisiana Supreme Court applied *contra non valentem* to find an obstacle where the defendants' threats, fraud, and misrepresentation prevented plaintiff from discovering the right to pursue a cause of action for wrongful death. *See id.* at 563. Neither of these cases dealt with a situation where the defendants' actions created an obstacle to drilling on a

mineral servitude. We consider the facts of *Delta Development* and *Nathan* too remote to those presented in the instant matter to provide any support for plaintiffs' argument that the court should find that, pursuant to contra non valentem, the government's restrictions on access to a portion of the servitude had the effect of preventing them from acting, thereby creating an obstacle that suspended prescription as to the entire servitude.

The concept of *contra non valentem* is not irrelevant to prescription of mineral servitudes, however. Indeed, the Louisiana Supreme Court has explained that Article 792, the predecessor to Mineral Code Section 59, is an example of *contra non valentem*. *See McDonald v. Richard*, 13 So. 2d 712, 715 (La. 1943). Further, in *Clark v. Tensas Delta Land Co.*, 136 So. 1, 2 (La. 1931), the Louisiana Supreme Court considered applying contra non valentem to a mineral servitude, but ultimately concluded that the concept was irrelevant given that the servitude owner never made any request "to enter upon the land, and that no objection to such entry upon the land was ever expressed by the owner of the land, previous to the filing of this suit." *Id.* The court did not consider whether mere hindering or impeding physical access to the land is sufficient to constitute an obstacle.[11]

Despite ample opportunity, the Louisiana courts have yet to apply *contra non valentem* to enunciate the broad interpretation of an obstacle urged by plaintiffs. In the context of use of a mineral servitude, Louisiana courts have found an obstacle to user only in cases where the servitude owner has been prevented from entering the *entire* servitude. In *Boddie v. Drewett*, 87 So. 2d 513 (La. 1956), a servitude underlying a twelve acre tract of land was pooled with other tracts by the Commissioner of Conservation. The Commissioner issued a conservation order that restricted drilling on the entire twelve acre servitude, but allowed drilling on other portions of the unit. *See Id.* at 518-19. The court declined to hold that good faith drilling of a dry hole on the drilling unit, but outside the subject servitude constituted user of the subject servitude. *See id*, at 518. Instead, the court

found that there was an obstacle to user of the servitude that suspended prescription because the Commissioner's order effectively prevented all drilling operations on the twelve acre tract. *See id.* at 518-19.

The Louisiana Supreme Court revisited similar issues later in *Mire v. Hawkins*. There, part of the lands burdened by a servitude were pooled with other tracts into a drilling unit by the Department of Conservation. A portion of the servitude remained outside the drilling unit available for drilling at all times. *See Mire*, 186 So. 2d at 594. The court ruled that where user could be had on any part of the drilling unit, there was no obstacle that suspended prescription. *See id.* at 596-97. It also found that user of any portion of the unit could be considered user of any servitude incorporated into the unit even where, the subject servitude was not open for drilling, thereby explicitly overruling its prior contrary determination in *Boddie*. *See id.* at 595. The court was guided by the premise that public policy did not favor unwarranted extensions of the prescriptive period, but rather supported the timely return of unused mineral servitudes to the landowner. *See id.* at 597.

As the plaintiffs aptly point out, the reason behind the Mire court's decision to overrule *Boddie* is not entirely clear given that in *Boddie* the servitude owner was effectively prevented from drilling on the entire servitude, whereas in *Mire* part of the servitude was not subject to the nondrilling order. Contrary to plaintiffs interpretation of *Boddie*, we do not believe that the court ruled *sub silentio* that a partial obstacle would result in complete suspension of prescription. Boddie is not squarely on all fours with the facts presented in the instant matter. There, the court based its decision on the fact that the servitude owner was prevented from effectively using his entire servitude. *Boddie*, 87 So. 2d at 519. Here, in contrast, a portion of Group A lands remained available for drilling, even where the government denied access to certain areas of the servitude. See discussion *infra* section III [C]. Also *Boddie* must now must be read against the backdrop of the court's later decision in *Mire*. *See Mire*, 186 So. 2d at 289

("After a further study of the opinion [in *Boddie*] we have concluded that it was error to say that prescription was suspended due to the existence of an obstacle."). *Mire* instructs that where any part of the lands burdened by a servitude are open to drilling, no obstacle exists and the prescriptive period continues to run.

Our interpretation of *Mire* and *Boddie* is supported by the decision of an intermediate state court in *Hanszen v. Cocke*, 246 So. 2d 200, 205 (La. Ct. App. 1st Cir. 1971). In *Hanszen*, pending litigation regarding the validity of a mineral lease prevented the servitude owner from drilling on a portion of his servitude. *See id.* at 206. The court ruled "that where any part of the servitude can be used . . . even though some part may not, as a result of an obstacle, prescription is not suspended, but to the contrary, runs against the entire servitude." *Id.* at 206.[12] It also noted that drilling on one portion of the land would suspend prescription for the entire servitude. *See id.* Unlike *Mire* and *Boddie*, *Hanszen* did not deal with a drilling unit, but with a single servitude. Hanszen is therefore more directly applicable to the facts presented in the instant case than the two Louisiana Supreme Court cases that focused on the ramifications to an individual servitude where the servitude land had been pooled with other tracts.

The plaintiffs also rely on *Corley v. Craft*, 501 So. 2d 1049, 1050-52 (La. Ct. App. 2d Cir. 1987), and *Hall v. Dixon*, 401 So. 2d 473, 474 (La. Ct. App. 2d Cir. 1981), for the proposition that an obstacle to user on a portion of the servitude effectuates suspension of the prescriptive period for the entire servitude.[13] The key distinction between those cases and the matter *sub judice*, which the plaintiffs fail to recognize, is that *Corley* and *Hall* dealt with instances where the servitude owner could not access any portion of the servitude. In *Hall* "[a]ccess [to the servitude] was only available through a locked gate" which created an obstacle that the court noted could not have been removed any legal way other than by instituting a lawsuit. *Hall*, 401 So. 2d at 474-76. Likewise, in *Corley*, the land owner had cut and excavated "the only suitable road into the tract" and obstructed the entry of the

servitude owner's drilling equipment. *Corley*, 501 So. 2d at 1051.[14] In contrast to *Hall* and *Corley*, in the instant case, entire sections of the servitude remained open to use at all times and were in fact accessed by other companies.

Plaintiffs also argue the government's restrictions on their use constituted an obstacle under Article 777 of the Civil Code, which prohibits the owner of a tract of land burdened by a servitude from doing anything to lessen the value of the servitude owner without his consent. *See* La. Civ. Code Ann. art. 777. The plaintiffs have not, however, cited any case law that supports their argument that the surface owner's act of lessening the value of the servitude results in an obstacle that suspends prescription.

The plaintiffs may not take shelter under their strained and overly broad conception of *contra non valentem*, *Boddie*, and the Louisiana Civil Code. After reviewing both parties' arguments concerning the proper legal standards to apply to this case, we conclude that the cases most factually similar to the instant matter, *Mire* and *Hanszen*, *supra*, are the appropriate guiding sources of law. These cases instruct that even if an obstacle defeats the plaintiffs use of part of their servitude, the availability of a portion of the servitude for drilling would preclude a finding that an obstacle suspended prescription for the entire servitude.[15]

C. Suspension of the Prescriptive Period Based on Thwarted Access to the Servitude

The ten-year prescriptive period applicable to mineral servitudes is interrupted only if the servitude owner engages in good-faith drilling operations. "Preparations for the commencement of actual drilling or mining operations, such as geological or geophysical exploration, surveying, clearing of a site, and the hauling and erection of materials and structures necessary to conduct operations do not interrupt prescription." La. Rev. Stat. Ann. § 31:30; *See Goldsmith v. McCoy*, 182 So. 2d 519, 523 (1938); *See also* La. Rev. Stat. Ann. § 31:29, cmt. (incorporating *Goldsmith* into the Mineral

Code). The only way that plaintiffs may prevail, therefore, is if they can show that they engaged in actual drilling, or that due to an obstacle created by the government, their access to the Group A and B lands was completely obstructed, such that the ten-year prescriptive period was suspended for over forty years between 1956, when Wm. T. Burton Industries abandoned its last well, and 1996, when the plaintiffs filed the instant lawsuit. *See* La. Rev. Stat. Ann. § 31:59; *Hanszen*, 246 So. 2d 106. Obviously, if the government prevented even preparatory drilling actions on the servitude, we would have to find that an obstruction prevented user of the servitude. *See, e.g. Corley*, 501 So. 2d at 1052.

1. Activities between 1956-1978

The United States argues that the plaintiffs have failed to raise genuine issues of material fact to refute their assertion that no obstacle suspended prescription between 1956 and 1966. There is evidence that Wm. T. Burton Industries' lessee, Pan American, drilled a well, in Section 4, Township 1 South, Range 5 West, an area that fell within the Fort Polk artillery range in 1964. *See* United States' Statement of Material Facts as to Which There is No Genuine Dispute, Statement 21d [hereinafter United States' Statement of Material Facts], Ex. 20; Pls.' Resp. to United States' Statement of Material Facts, Resp. to Statement 21d, at 33.[16] Although Pan American's well was dry, even drilling of a dry well is sufficient user to interrupt prescription. *See* La. Rev. Stat. Ann. § 31:29, cmt.; *Barnwell v. Carter*, 220 So. 2d 741, 745 (La. App. 1st Cir. 1969). A lessee's user of the servitude inures to the servitude owner. *See Dupree v. Oil. Gas & Other Minerals*, 731 So. 2d 1067, 1070 (La. Ct. App. 2d Cir. 1999). The user of the servitude by Pan American therefore would have interrupted prescription over the 1929 mineral servitude. The prescriptive period would have began to run anew 20 March 1964, the date that Pan American plugged its well. *See* La. Rev. Stat. Ann. § 31:29[17]

As stated previously, the parties generally agree that as of 1967, a moratorium on mineral operations was in effect in the

Intensive Use Area that covered most of Group B lands and about forty to fifty percent of Group A lands. There is ample evidence in the record demonstrating that Wm. T. Burton Industries and several other companies were prevented from accessing the artillery range during the moratorium. For instance, the plaintiffs reference two letters sent by the Army to Senator Allen Ellender dated 16 September 1968 and 8 January 1969 indicating that no access would be allowed to the Fort Polk artillery range. *See* Pls.' Resp. to United States' Statement of Material Facts, Exs. 10r, 10t. In 1969, Major General John C. Dalrymple sent a letter to Senator Allen Ellender informing him that "authorization for seismographic operations under the entire [artillery] range area [at Fort Polk] is incompatible with the training mission" of the Army. *See id.*, Ex. 10w The plaintiffs also provide a letter dated 29 May 1968 from Wm. T. Burton Industries to the Army regarding the pending expiration of the government's lease to the land. In this letter, John Camp, the attorney for Wm. T. Burton Industries, explained that the government had denied entry permits to the artillery range to its lessee, Pan American, but suggested that several companies would be interested in mineral exploration should access be permitted. *See id.*, Ex. 8c ("Pan American reported that it was unable to obtain entry permits onto the adjacent Fort Polk artillery range for the purpose of conducting mineral exploration activities thereon.")

The moratorium continued during the 1970s. Plaintiffs have submitted correspondence sent by the Army to Representative Speedy O. Long in 1970 informing him that Chevron Oil would not be able to obtain a lease to Fort Polk both because the United States did not own the mineral rights, and because the government had imposed a moratorium on minerals underlying the Fort Polk artillery range. *See id.*, Ex. 10y. Wm. T. Burton Industries again expressed an interest in drilling on Fort Polk in a meeting with the Army on 27 November 1973. *See id.*, Ex. 10dd (Disposition Form Re: Trip Report to Negotiate Settlement of Annual Payment for Moratorium in Minerals, Fort Polk, La.). According to Camp, the Army continually indicated to Wm. T.

Burton Industries that "there ain't going to be no drilling on this reservation." Camp Dep. at 91.[18] Teledyne Exploration Company, acting on behalf of Atlantic Richfield Oil Company, likewise was denied access to the artillery range through a letter from the Army for similar reasons in February 1973. *See id.*; Ex. 10cc.

The plaintiffs' submissions demonstrate that Wm. T. Burton Industries and other companies did indeed express an interest in drilling on Fort Polk throughout the 1960s and 1970s, but were repeatedly denied access by the government due to military operations in the area that would potentially prove dangerous to companies engaging in geophysical exploration. *See also* Exs. 10ee-mm (detailing extent of government's moratorium).[19] Regardless, the plaintiffs' evidence deals only with the area subject to the moratorium and not the portion of the servitude that lies outside of the area restricted by the Army. Even when the moratorium was in place, the plaintiffs admit that about forty-percent of the total acreage of the servitude was outside the Intensive Use Area and not covered by the government's moratorium. *See* United States' Statement of Material Facts, Ex. 13; Pls.' Resp. to United States' Statement of Material Facts, Statement 8h, at 10.[20] Again, if portions of the servitude remained open to drilling, the government's moratorium would not be considered an obstruction that would have suspended prescription. *See Hanszen*, 246 So. 2d at 206.

The plaintiffs have not presented any proof that Win. T. Burton Industries' was denied access to the portion of Group A lands that remained outside the artillery range and exempt from the government's moratorium. They also do not explain why they did not attempt to access the servitude when other companies clearly were granted permission to do so by the United States. There is considerable evidence that indicates that Wm. T. Burton Industries should have been on notice that they were able to enter portions of its servitude during the 1960s and 1970s. The plaintiffs' argument that the prescriptive period was suspended by the creation of an obstacle by the government during the early 1960s is

undermined by the fact that Vim. T. Burton Industries' own lessee, Pan American, was able to access a portion of the servitude to engage in drilling so as to interrupt prescription in 1964. Moreover, it is apparent that numerous seismic surveys were shot over the 1929 servitude between 1966 to 1984. According to the seismic line map compiled by Gretchen Hunt of the Forest Service, lines were shot over the servitude by CGG and Chevron in 1970, by Arco from 1971-73, and by Shell in 1976. *See* Hunt Decl., Attachments (relying, in part, on information obtained by plaintiffs' land man Val Miller)

If companies were able to access the Limited Use Area during the 1970s, the court is inclined to conclude that Wm. T. Burton Industries also could have entered the land. In its reply to the government's motion for summary judgment, the plaintiffs state that they were "prevented from crossing the lands subject to the condemnation proceedings to reach those lands which were not." They fail to provide any summary judgment evidence to support this statement. Further, although the plaintiffs dispute the accuracy of the information provided by the government, they fail to present summary judgment evidence to directly refute the evidence that lines were shot by CGG, Chevron, Arco, and Hess during the 1970s. The information that the Army allowed access for geophysical operations during this period vitiates plaintiffs' arguments that the government denied access to the servitude during the 1970s so as to create an obstacle to plaintiffs' use of the land. Again, the availability of even part of the servitude for drilling would have caused the servitude to lapse for nonuse. *See Mire*, 186 So. 2d at 595-97; *Hanszen*, 246 So. 2d at 206. Although the evidence of access detailed above defeats a finding that an obstacle existed, it is not sufficient to show that the prescriptive period was interrupted. Even if the companies that conducted seismic surveys were acting at the behest of Wm. T. Burton Industries, as the plaintiffs imply,[21] since no drilling actually occurred, prescription would not have been interrupted. *See* La. Rev. Stat. Ann. § 31:30.

2. Activities Between 1978 and 1996

Assuming, arguendo, that the servitude did not prescribe due to nonuse prior to 1978, it is evident that the servitude still would have lapsed sometime between 1978 and 1996. The impediment to exploration of the Fort Polk artillery range was lifted as of 31 March 1978. *See* United States' Mot. for Summ. J., Ex. 48 (letter dated 31 March 1977 from John Camp to Michael Drost acknowledging that Army's moratorium was to end on 31 March 1978); Ex. 55 (letter from Major General William B. Steele to Commander, US Army FORSCOM dated 6 June 1977 explaining that moratorium over Fort Polk was to end on 31 March 1978). The plaintiffs urge, however, that the government continued effectively to deny access to the servitude through a *de facto* moratorium subsequent to 1978. As mentioned previously, mere preparatory activities such as geophysical exploration and surveying, do not interrupt prescription. *See* La. Rev. Stat. Ann. § 31:30. It is undisputed that Wm. T. Burton Industries did not engage in actual drilling between 1978 and 1996. *See* Pls.' Resp. to United States' Statement of Material Facts, Resp. to Statement 36, at 58. Therefore, the only way the plaintiffs can avoid summary judgment is if they can show that the United States continued to block access to the lands burdened by the 1929 servitude between 1978 and 1996.

There were several occurrences that should have put Wm. T. Burton Industries on notice that they could have used their servitude subsequent to 1978. As an initial matter, Wm. T. Burton Industries should have been put on notice that entry would be permitted by the fact that the government stopped paying Wm. T. Burton Industries to refrain from using the artillery range for drilling activity in 1978. *See* United States' Statement of Material Facts, Statement 27; United States' Mot. for Summ. J., Ex. 55 (letter from Major General William B. Steele to Commander, US Army FORSCOM dated 6 June 1977 explaining that moratorium payments were to end on 31 March 1978); Pls.' Resp. to United States' Statement of Material Facts, Statement 27, at 43. Moreover, it is apparent that various companies were able to access portions of the

servitude to conduct seismographic surveys after 1978. For instance, with a permit from Wm. T. Burton Industries, Shell Oil secured the right to enter a portion of the lands burdened by the servitude in 1980. *See id.*, Exs. 20, 21. Certainly, the existence of a permit between Wm. T. Burton Industries and Shell shows that Vim. T. Burton Industries had knowledge that the government was allowing access to a portion of the servitude. Further, Delta Exploration and Petty Ray Geosource, on behalf of Chevron Oil, each ran seismic surveys with permission of the Forestry Service and the Army in 1981. *See id.*, Pls.' Resp. to Statements 42d, 42f, at 66-68; United States' Mot. for Summ J., Exs. 73. 74. The United States also allowed Hunt Exploration to access the servitude in 1980, although there is no indication that Hunt actually undertook exploratory actions. *See* United States' Mot. for Sum. J., Ex. 69.

In addition, Hunt's chart detailing seismic surveys shot over the servitude shows that seventeen seismic lines were shot by various companies including Seitel Data Ltd., Shell, Stratex, Chevron, Amoco/Delta, and Petty-Ray Geophysical between 1980 and 1984. *See* Hunt Decl., Attachments; United States' Mot. for Summ. J., Ex. 90.[22] Certainly, if some companies were able to conduct seismic surveys over Group A and B lands during the 1980s, plaintiffs cannot now argue that an obstruction blocked its access to the servitude. Finally, there is absolutely no evidence in the record that Wm. T. Burton Industries or any other company sought access to the servitude between 1984 and 1996. Even if the servitude did not prescribe prior to 1984, this twelve year period of inactivity alone would have resulted in the servitude reverting to the United States as surface owner.

Plaintiffs argue that the government's restrictions made it impractical to use their servitude. Even if the government's moratorium may have made it more difficult and less productive to engage in drilling operations on the Group A lands, pursuant to Louisiana law, the availability of even a portion of the land for drilling would not have suspended prescription. *See Mire*, 186 So. 2d at 595-597; *Hanszen*, 246

So. 2d at 206. The plaintiffs do not present any pertinent summary judgment evidence to refute the government's argument that no obstacle existed that prevented the plaintiffs' predecessor Wm. T. Burton Industries from accessing portions of the servitude between 1978 and 1996.[28]

IV. Conclusion

For the reasons set forth above, we DENY plaintiffs' motion to strike the declarations of Hunt and Jaquette. Interpreting the evidence in the light most favorable to the plaintiffs, as we are bound to do in a motion for summary judgment, we conclude that no issues of material fact remain for trial. Although numerous factual disputes remain between the parties, summary judgment is not precluded if there are mere factual discrepancies. Rather, there must be a genuine issue of *material* fact remaining for trial. *See Anderson*, 477 U.S. at 249-50, 106 S. Ct. at 2509-10. We find no remaining issues of fact that would affect the outcome of this case.

Plaintiffs have failed to refute the government's argument that there were at least ten years of nonuse of the servitude between 1964 and 1996 with competent summary judgment evidence. Ten years of nonuse effectuates a reversion of the mineral servitude to the surface owners. *See* La. Rev. Stat. Ann. § 31:27 (Mineral Code concept of prescription); La. Civ. Code Ann. art. 753 (prescription under the Civil Code). The servitude therefore reverted to the ownership of the United States sometime prior to 1996. This finding comports with the public policy of this state, which "favors the timely return of outstanding minerals to the owner of the land." *Mire*, 166 So. 2d at 597. The government's s motion for summary judgment is GRANTED and the plaintiffs' complaint is DISMISSED WITH PREJUDICE.

Alexandria, Louisiana

28 July 2000

F.A. LITTLE, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT

Footnotes

1 The ownership of plaintiffs in the subject servitude is as follows: Central Pines Land Company owns an undivided fifty percent of all the oil, gas, and minerals subject to the following royalties: one-half of one percent in favor of Jack E. Lawton, Jr., one-fourth of once percent in favor of Evelyn Gay Lawton Duhon, one-fourth of one percent in favor of Linda Lew Lawton Drost. Tower Minerals Company also owns an undivided fifty percent of all of the oil, gas, and minerals subject to the following royalties: one-half of one percent in favor of Jack E. Lawton, Jr., one-fourth of once percent in favor of Evelyn Gay Lawton Duhon, one-fourth of one percent in favor of Linda Law Lawton Drost, four and two-tenths percent in favor of D,S & T, Inc., and two and eight-tenths in favor of Drost & Brame, Inc.

2 The parties dispute the precise acreage of Group A lands. The United States asserts that Group A lands comprise approximately 31,088.01 acres. *See* United States' Statement of Material Facts as to Which There is No Genuine Dispute [hereinafter United States' Statement of Material Facts]. Statement 4. The plaintiffs contend that Group A lands include 25,074.96 acres. *See* Pls,' Resp. to United States' Statement of Materiel Facts, Resp. to Statement 4, at 3.

3 According to the United States, Group B include approximately 5,106 acres. *See* United States' Statement of Materiel Facts, Statement 4. The plaintiffs assert that Group B covers 11,000 acres. *See* Pls.' Resp. to United States' Statement of Materiel facts, Resp. to Statement 4, at 3.

4 This court's ruling on the prior motion for summary judgment presented to the court established that the Group C lands could not prescribe to the government. The mineral ownership of these lands are no longer at issue in this case.

5 We offer no opinion as to whether Hunt would be qualified as an expert witness at trial.

6 "When plaintiff's petition shows on its face that the prescriptive period has run, burden is on the plaintiff to prove an interruption or suspension of prescription." *Salvex, Inc. v. Lewis*, 546 So. 2d 1309, 1315 (La. Ct. App. 3d Cir. 1989).

7 The mineral servitude in this case was created in 1929 and actively drilled until 4 January 1956. The parties dispute the appropriate law to apply in this case. The Mineral Code did not take effect until 1975 after the creation of the servitude at issue in this case. The Mineral Code is to be applied retroactively unless it would apply to divest already vested rights, or to impair the obligations of contracts." La. Rev. Stat. Ann. § 31:214 (West 2000). The plaintiffs have not argued that the application of the Mineral Code would impair pre-existing vested rights or the obligation of contracts. Accordingly, we see no reason not to apply the Mineral Code to this case. Regardless, the parties agree that the provisions of the Mineral Code relevant to this case are identical to the corresponding law in the Civil Code. As such, the parties arguments on this issue are inconsequential to the outcome of this case.

8 Interruption and suspension are distinct concepts. When prescription is interrupted, the ten-year prescriptive period starts to run anew on the last day on which good faith operations are undertaken to secure or restore production. *See* La. Rev. Stat. Ann. § 31:41 (West 2000). In contrast where the prescriptive period is merely suspended, the period that had accrued prior to the creation of the obstacle continues to run once the obstacle is removed. *See id.* § 31:59.

9 Prescription does not run against one unable to act. *Cartwright v. Chrysler Corp.*, 232 So. 2d 285 (La. 1970).

10 Contra non valentem applies in four situations: (1) where there was some legal cause which prevented the courts or

their officers from taking cognizance of or acting on the plaintiff's action; (2) where there was some condition coupled with a contract or connected with the proceedings which prevented the creditor from suing or acting; (3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant. *See Fontenot v. ABC Ins. Co.*, 614 So. 2d 960 (La. 1998); *Taylor v. Giddens*, 618 So. 2d 834 (La. 1993).

11 The plaintiffs also briefly mention a Fifth Circuit case applying *contra non valentem*. *See Frey v. Amoco Production Co.*, 943 F.2d 678 (5th Cir. 1991). That case does not apply *contra non valentem* to instances where the servitude owner is prevented from using his servitude by actions of the surface owner. Rather, the court recognized that "Louisiana courts apply the contra non valentem doctrine to suspend the period's beginning while the cause of action is not knowable by the plaintiff through the exercise of reasonable diligence." *Id.* at 586. Obviously, that is not the issue in the instant matter. We are unpersuaded that *Frey* has any relevance to this case.

12 The plaintiffs urge that we are not compelled to follow this decision under the principle that federal courts must rule according to the law of the highest court of the state in which it encompasses. We do not agree, as suggested by plaintiffs, that *Hanszen* was wrongly decided. As a federal court, we are bound to determine state law as we believe the state's highest court would. *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 328 (5th Cir. 1999), We view the *Hanszen* court's ruling as an accurate interpretation of Louisiana law governing suspension of prescription of a mineral servitude. We do not share the plaintiffs' concern that *Hanszen* is unsound because it would interfere with mineral owners' rights where only a small area is allowed for drilling. Plaintiffs have not demonstrated that only a small portion of the servitude was available for drilling when the moratorium was in effect such

that we should find that the government's moratorium "effectively prevented" all access to the servitude. *See infra* section III(C).

13 Contrary to the unprofessional assertions of counsel for the plaintiffs, we find that the position of the defendant is based neither on "falsehoods" nor on a total misunderstanding of Louisiana mineral law." In fact, the defendant's positions are well reasoned, well defended, and, in our judgment, reflective of the applicable law on the subject as discussed in the preceding text. The plaintiffs' legal and factual analysis, on the other head, is procrustean at best.

14 The plaintiffs cite *Perkins* for the proposition that anything short of "*free access*" to the servitude constitutes an obstacle. Plaintiffs took this quote from *Perkins* out of context. In fact, the court declined to find an obstacle because the surface owner "did not at any time deny to defendant (servitude owner) free access to the land for exploration purposes." *Perkins*, 81 So. 2d at 393. The court simply did not indicate that a hindrance to "free access" resulted in suspension of the prescriptive period, We reject the interpretation proposed by plaintiffs.

15 We reject the plaintiffs' argument that they could not have removed the obstructions created by the government because an individual is powerless to remove an obstacle created by the United States. *See Duncan Energy Co. v. United States Forest Service*, 50 F.3d 584 (8th Cir. 1984). In *Duncan*, the Eighth Circuit discussed whether the Forest Service could regulate surface access to outstanding mineral rights. The court concluded that the Forest Service may not prevent a mineral owner from exercising his rights to use the servitude. This is not a problem in this case because, as discussed *infra*, here there is evidence that Wm. T. Burton Industries could have accessed a portion of the Group A lands not burdened by the moratorium, The plaintiffs do not adequately develop how *Duncan* has any application to the instant matter.

16 Plaintiffs' Answers to United States First Set of Interrogatories indicates that this well was spudded on 30 September 1963. *See* United States' Mot. for Summ. J., Ex. 69.

17 Pan American ultimately did release its lease to Wm. T. Burton Industries because it was having trouble accessing the artillery range. *See* Pls.' Resp. to United States' Statement of Material Facts, Ex. 10c. This does not supplant the fact that Pan American's activities show that at least part of the servitude was available for drilling.

18 The vague nature of Camp's statements are outweighed by the overwhelming evidence that the government did allow entry onto portions of the servitude throughout the 1970s. So overwhelming in tact and in law that no reasonable trier of fact could find otherwise. *See* discussion *infra*.

19 Plaintiffs provide extensive documentary evidence regarding the Army's continuing moratorium on the Fort Polk artillery range, only a small portion of which are referenced here, We find it unnecessary to detail every piece of evidence given that Fort Polk did not comprise the full area of the servitude and that other parts of the servitude were available for drilling activity.

20 Plaintiffs then contradict themselves in baldly asserting that the entirety of Group A and B lands were subject to intensive use by the military, but provide no Summary Judgment evidence to support this proposition. *See* Pls.' Resp. to United States' Statement of Material Facts, Reap. to Statement 23, at 41.

21 [U]se of a mineral servitude must be by the owner of the servitude, his representative or employee, or some other person acting in his behalf. La. Rev. Stat. Ann. 3 3142 (West 2000); *see also id.* cmts. (explaining the comparable law under the pre-existing Civil Code). A person Is acting on behalf of a servitude owner only when there is a legal relationship between him and the servitude owner, such as co-ownership or agency, or when there is clear and

convincing evidence that he intended to act for the servitude owner, . . ." La. Rev, Stat. Ann. 31:43.

22 Again, even if these companies were acting as agents of Wm. T. Burton Industries when they shot the surveys, mere geophysical operations are not sufficient to interrupt prescription. *See* La. Rev. Stat. Ann. 331:30.

23 The plaintiffs point out that the government leased the minerals to other companies beginning in 1992. *See* Pls.' Resp. to United States' Statement of Material Facts, Ex, 16. The surface owner's leasing of the minerals underlying his land to someone other than the servitude owner does not in and of itself constitute an obstacle. *See Gavoso Co. v. Arkansas Natural Gas Corp.*, 145 So. 677, 679-80 (La. 1933); *see also Gailey v. McFarlain*, 193 So. 570, 578-79 (La. 1940)(prior recorded mineral lean on land upon which mineral servitude Is subsequently created does not constitute an obstacle).

No. 00-31024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CENTRAL PINES LAND CO; TOWER MINERALS COMPANY INC; JACK E LAWTON, JR; EVELYN GAY LAWTON DUHON; LINDA LEW LAWTON DROST; D S & T INC; DROST & BRAME INC,
Plaintiffs - Appellants-Cross-Appellees

v.

UNITED STATES OF AMERICA;
Defendant - Appellee-Cross-Appellant;

TEXACO EXPLORATION & PRODUCTION INC; SONAT EXPLORATION CO; CHESAPEAKE OPERATING INC; C H C GERARD; UNION PACIFIC RESOURCES CO,
Defendants - Appellees

March 8, 2002, Filed

JUDGES:

Before HIGGINBOTHAM, BARKSDALE, and STEWART, Circuit Judges. Judges KING and DAVIS did not participate in the consideration of the rehearing en banc.

OPINION:

ON PETITION FOR REHEARING AND REHEARING EN BANC

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:
Patrick E. Higginbotham
United States Circuit Judge

WEST'S LOUISIANA STATUTES ANNOTATED LOUISIANA
REVISED STATUTES TITLE 31. MINERAL CODE
CHAPTER 8. MINERAL RIGHTS IN LAND
ACQUIRED OR EXPROPRIATED BY GOVERNMENTS
OR GOVERNMENTAL AGENCIES

§ 149. Mineral rights reserved from acquisitions of land by governments or agencies thereof imprescriptible

A. When land is acquired from any person by the United States or the state of Louisiana, or any subdivision or agency of either, or any legal entity with expropriation authority by conventional deed, donation, or other contract or by condemnation or expropriation proceedings and by the act of acquisition, order, or judgment, a mineral right otherwise subject to the prescription of nonuse is reserved, the prescription of nonuse shall not run against the right so long as title to the land remains in the government, or any of its subdivisions or agencies, or any legal entity with expropriation authority.

B. (1) However, before the property can be transferred from the state or federal governmental agency, or any legal entity with expropriation authority to a third person, the taking agency or legal entity must first offer to sell at the fair market value whatever rights or interest in the land it acquired subject to the mineral reservation back to its original grantor, donor, or vendor, or his successors. In the event of a rejection by the grantor, donor, or vendor, or his successors of the offer to sell the property at the prevailing market price, the governmental agency or legal entity may sell the property to a third person as provided by law for the sale of publicly owned lands.

(2) If the original grantor, donor, or vendor, or his successors cannot be found within one year from the date of the official decision to sell the property, the governmental agency or legal entity may institute suit against the absentee grantor,

donor, or vendor, or his successor to seek a judgment declaring the offer rejected. The court shall appoint an attorney to represent the absentee defendant in such proceedings.

(3) If the land or any part thereof is transferred by the government, or subdivision, or agency, or legal entity with expropriation authority to a private owner, the prescription of nonuse shall apply, as in the usual case, but shall commence only from the date on which the act of acquisition by the private owner is filed for registry.

(4) The provisions of Subsections B(1) and (2), relative to the right of first refusal, shall not apply to a corporation which has had its articles of incorporation and franchise revoked pursuant to R.S. 12:163.

C. Notwithstanding any provision of law to the contrary, when land within the Atchafalaya Basin Floodway is acquired from any person by the United States or the state of Louisiana, or any subdivision or agency of either, or any legal entity with expropriation authority by conventional deed, donation, or other contract or by condemnation or expropriation proceedings and by the act of acquisition, order, or judgment, a mineral right otherwise subject to the prescription of nonuse is reserved, the prescription of nonuse shall thereafter not run against the right whether the title to the land remains in the government, or any of its subdivisions or agencies, or any legal entity with expropriation authority, or is subsequently transferred to a third person, public or private.

D. For purposes of this Section, "Atchafalaya Basin Floodway" means that area bounded by U.S. Highway 190 on the north, U.S. Highway 90 on the south, the East Atchafalaya Basin Protection levee on the east, and the West Atchafalaya Basin Protection levee on the west.

§ 149.1. Mineral rights imprescriptible when reserved in transfers of land to state or national, nonprofit land conservation organization

A. (1) When land is acquired from any person by an organization certified by the secretary of the Department of Natural Resources to be a state or national, nonprofit land conservation organization by conventional deed, donation, or other contract and by the act of acquisition, a mineral right otherwise subject to the prescription of nonuse is reserved, the prescription of nonuse shall not run against the mineral right so long as title to the land remains with the state or national, nonprofit land conservation organization.

(2) The state or national, nonprofit land conservation organization is only authorized to convey the property involved to another state or national, nonprofit land conservation organization, to the state, or to the federal government. If the land, or any part thereof, is transferred by the state or national, nonprofit land conservation organization to any other state or national, nonprofit land conservation organization, the state, or the federal government, the prescription of nonuse shall not apply.

(3) If the nature, purpose, or goal of the state or national, nonprofit land conservation organization changes, such that land conservation is no longer the primary objective, the land that it acquired in its former capacity shall immediately be offered to another state or national, nonprofit land conservation organization, to the state, or to the federal government in the same manner and for the same price, if any, as was provided in the original transfer of the land.

B. All lands covered by the provisions of this Section may be open to public use and recreation including but not limited to hunting, fishing, hiking, field trails, trail rides, and picnicking, at the discretion of the state or national, nonprofit land conservation organization depending upon the ecological appropriateness of such. Such hunting and fishing shall be at the times and in accordance with the state laws establishing

licensing and season requirements.

§ 149.2. Mineral rights imprescriptible; natural areas

When land is acquired from any person by the Department of Wildlife and Fisheries pursuant to the Louisiana Natural Areas Registry law, R.S. 56:1861 et seq., by conventional deed, donation, or other contract and by the act of acquisition a mineral right otherwise subject to the prescription of nonuse is reserved, the prescription of nonuse shall not run against the mineral right so long as title to the land remains with the Department of Wildlife and Fisheries.

§ 150. Application of prescription to rights outstanding when land acquired

When land is acquired in the manner prescribed in Article 149, the prescription of nonuse shall continue to run against any then outstanding mineral rights subject to such prescription and shall accrue in favor of the owner from whom the land was acquired. Thereafter, the prescription of nonuse shall not run against such rights except as provided in Article 151.

ACT No. 278
AN ACT

To amend and re-enact Section 5806 of Title 9 of the Louisiana Revised Statutes of 1950 relative to imprescriptibility of oil, gas, mineral and royalty rights reserved on land acquired by the United Stales or subdivisions or agencies thereof or by the State Department of Highways, State Department of Public Works and the several levee districts of the state, or by the State Department of Wildlife & Fisheries, or by a police jury, school district, school board or other board, or by any commission, heretofore or hereafter created or established by the State of Louisiana and relative to the reversion of outstanding oil, gas, mineral and royalty rights which prescribe after such acquisition by said governmental agencies.

Be it enacted by the Legislature of Louisiana:

Section 1. Section 5806 of Title 9 of the Louisiana Revised Statutes of 1950 is hereby amended and re-enacted to read as follows:

§ 5806 Oil, gas, mineral and royalty rights; land acquired by certain public bodies; imprescriptible; reversion of rights.

(1) When land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies from any person, firm or corporation, and by the act of acquisition, order or judgment, oil, gas or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas or other minerals or royalties, still in force and effect, the rights so reserved or previously sold shall be imprescriptible.

(2) When land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the State Department of Highways, the State Department of Public Works or by any of the several levee districts in the state, or by the State Department of Wildlife & Fisheries, or by a police jury, school district, school board or other board, or by any commission, heretofore or hereafter created or established by the State of Louisiana, from any person, firm

or corporation, and by the act of acquisition, order or judgment, oil, gas or other mineral or royalties are reserved, the rights so reserved shall he imprescriptible and shall remain vested in the person, (firm or corporation from whom the land was acquired, condemned or expropriated, or in the heirs or assigns of that person, firm or corporation; provided, however, that should the ownership of such land pass into private hands, the prescription of non-use provided by R.C.C. Arts. 789 and 3546 shall apply as in the usual case, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas or other minerals or royalties, still in force and effect, the rights so reserved or previously sold shall prescribe for non-use by the owner thereof, but such rights shall revert to the owner of the land at the time of its acquisition, condemnation or expropriation by the state governmental agency, or to said owner's heirs or assigns, rather than to the owner of the expropriated land at the time of reversion; provided, however, that should the ownership of such land pass into private hands, the prescription of non-use provided by, R.C.C. Arts. 780 arid 3546 shall apply as in the usual case.

Section 2. All laws or parts of laws in conflict herewith are hereby repealed, provided, however, that if this act is declared unconstitutional, in whole or in part, the rights of all parties affected by any such decision shall be determined in accordance with the laws in force and effect prior to the time that this act takes effect

Approved by the Governor: July 8, 1958.

CHAP. 186.—An Act To enable any State to cooperate with any other State or States, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable rivers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States is hereby given to each of the several States of the Union to enter into any agreement or compact, not in conflict with any law of the United States, with any other State or States for the purpose of conserving the forests and the water supply of the States entering into such agreement or compact.

SEC. 2. That the sum of two hundred thousand dollars is hereby appropriated and made available until expended, out of any moneys in the National Treasury not otherwise appropriated, to enable the Secretary of Agriculture to cooperate with any State or group of States, when requested to do so, in the protection from fire of the forested watersheds of navigable streams; and the Secretary of Agriculture is hereby authorized, and on such conditions as he deems wise, to stipulate and agree with any State or group of States to cooperate in the organization and maintenance of a system of fire protection on any private or state forest lands within such State or States and situated upon the watershed of a navigable river: Provided, That no such stipulation or agreement shall be made with any State which has not provided by law for a system of forest-fire protection: Provided further, That in no case shall the amount expended in any State exceed in any fiscal year the amount appropriated by that State for the same purpose during the same fiscal year.

Sec. 3. That there is hereby appropriated, for the fiscal year ending June thirtieth, nineteen hundred and ten, the sum of one million dollars, and for each fiscal year thereafter a sum not to exceed two million dollars for use in the examination, survey, and acquirement of lands located on the headwaters of navigable streams or those which are being or which may

be developed for navigable purposes: Provided, That the provisions of this section shall expire by limitation on the thirtieth day of June, nineteen hundred and fifteen.

Sec. 4. That a commission, to be known as the National Forest Reservation Commission, consisting of the Secretary of War, the Secretary of the Interior, the Secretary of Agriculture, and two members of the Senate, to be selected by the President of the Senate, and two members of the House of Representatives, to be selected by the Speaker, is hereby created and authorized to consider and pass upon such lands as may be recommended for purchase as provided in section six of this Act, and to fix the price or prices at which such lands may be purchased, and no purchases shall be made of any lands until such lands have been duly approved for purchase by said commission: Provided, That the members of the commission herein created shall serve as such only during their incumbency in their respective official positions, and any vacancy on the commission shall be filled in the manner as the original appointment.

Sec. 5. That the commission hereby appointed shall, through Its president, annually report to Congress, not rater than the first Monday in December, the operations and expenditures of the commission, in detail, during the preceding fiscal year.

Sec. 6. That the Secretary of Agriculture is hereby authorized and directed to examine, locate, and recommend for purchase such lands as in his judgment may be necessary to the regulation of the flow of navigable streams, and to report to the National Forest Reservation Commission the results of such examinations: Provided, That before any lands are purchased by the National Forest Reservation Commission said lands shall be examined by the Geological Survey and a report made to the Secretary of Agriculture, showing that the control of such lands will promote or protect the navigation of streams on whose watersheds they lie.

Sec. 7. That the Secretary of Agriculture is hereby authorized to purchase, in the name of the United States, such lands as have been approved for purchase by the National Forest Reservation Commission at the price or prices fixed by said commission: Provided, That no deed or other instrument of conveyance shall be accepted or approved by the Secretary

of Agriculture under this Act until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams.

Sec. 8. That the Secretary of Agriculture may do all things necessary to secure the safe title in the United States to the lands to be acquired under this Act, but no payment shall be made for any such lands until the title shall be satisfactory to the Attorney-General and shall be vested in the United States.

Sec. 9. That such acquisition may in any case be conditioned upon the exception and reservation to the owner from whom title passes to the United States of the minerals and of the merchantable timber, or either or any part of them, within or upon such lands at the date if the conveyance, but in every case such exception and reservation and the time within which such timber shall be removed and the rules and regulations under which the cutting and removal of such timber and the mining and removal of such minerals shall be done shall be expressed in the written instrument of conveyance, and thereafter the mining, cutting, and removal of the minerals and timber so excepted and reserved shall be done only under and in obedience to the rules and regulations so expressed.

Sec. 10. That inasmuch as small areas of land chiefly valuable for agriculture may of necessity or by inadvertence be included in tracts acquired under this Act, the Secretary of Agriculture may, in his discretion, and he is hereby authorized, upon application or otherwise, to examine and ascertain the location and extent of such areas as in his opinion may be occupied for agricultural purposes without injury to the forests or to stream flow and which are not needed for public purposes, and may list and describe the same by metes and bounds, or otherwise, and offer them for sale as homesteads at their true value, to be fixed by him, to actual settlers, in tracts not exceeding eighty acres in area, under such joint rules and regulations as the Secretary of Agriculture and the Secretary of the Interior may prescribe; and in case of such sale the jurisdiction over the lands sold shall, ipso facto, revert to the State in which the lands sold lie. And no right, title, interest, or claim in or to any lands

acquired under this Act, or the waters thereon, or the products, resources, or use thereof after such lands shall have been so acquired, shall be initiated or perfected, except as in this section provided.

Sec. 11. That, subject to the provisions of the last preceding section, the lands acquired under this Act shall be permanently reserved, held, and administered as national forest lands under the provisions of section twenty-four of the Act approved March third, eighteen hundred and ninety-one (volume twenty-six, Statutes at Large, page eleven hundred and three), and Acts supplemental to and amendatory thereof. And the Secretary of Agriculture may from time to time divide the lands acquired under this Act into such specific national forests and so designate the same as he may deem best for administrative purposes.

Sec. 12. That the jurisdiction, both civil and criminal, over persons upon the lands acquired under this Act shall not be affected or changed by their permanent reservation and administration as national forest lands, except so far as the punishment of offenses against the United States is concerned, the intent and meaning of this section being that the State wherein such land is situated shall not, by reason of such reservation and administration, lose its jurisdiction nor the inhabitants thereof their rights and privileges as citizens or be absolved from their duties as citizens of the State.

Sec. 13. That five per centum of all moneys received during any fiscal year from each national forest into which the lands acquired under this Act may from time to time be divided shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such national forest is situated, to be expended as the state legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated: Provided, That when any national forest is in more than one State or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein: Provided further, That there shall not be paid to any State for any county an amount equal to more than forty per centum of the total income of such county from all other sources.

Sec. 14. That a sum sufficient to pay the necessary expenses of the commission and its members, not to exceed an annual expenditure of twenty-five thousand dollars, is hereby appropriated out of any money in the Treasury not otherwise appropriated. Said appropriation shall be immediately available, and a be paid out on the audit and order of the president of the said commission, which audit and order shall be conclusive and binding upon all departments as to the correctness of the accounts of said commission
Approved, March 1, 1911.

CHAP. 145. - An Act Making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and fourteen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury of the United States not otherwise appropriated, in full compensation for the fiscal year ending June thirtieth, nineteen hundred and fourteen, for the purposes and objects hereinafter expressed namely:

MISCELLANEOUS.

And the Secretary of Agriculture is hereby authorized to continue investigations on the cost of food supplies at the farm and to the consumer, and to disseminate the result of such investigations in whatever manner he may deem best.
ENFORCEMENT OF THE INSECTICIDE ACT: To enable the Secretary of Agriculture to carry into effect the provisions of the Act of April twenty-sixth, nineteen hundred and ten, entitled "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded Paris greens, lead arsenates, and other insecticides, and also fungicides, and for regulating traffic therein, and for other purposes," in the city of Washington and elsewhere, including chemical apparatus, chemicals, and supplies, repairs to apparatus, gas, electric current, official traveling expenses, telegraph and telephone service, express and freight charges, and all other

expenses, employing such assistants, clerks, and other persons as may be considered necessary for the purposes named, $95,000.

FIGHTING AND PREVENTING FOREST FIRES IN EMERGENCY: For fighting and preventing forest fires in cases of extraordinary emergency, $200,000, or so much thereof as may be necessary.

To enable the Secretary of Agriculture to meet the emergency caused by the continuous spread of the chestnut-bark disease by continuing the study of the nature and habits of the parasitic fungus causing the disease, for the purpose of discovering new methods of control, and by putting into application methods of control already discovered, $80,000, and the Secretary of Agriculture is hereby authorized to expend said appropriation in such manner as he shall deem best, in cooperation with the authorities of the States concerned or with individuals, and to pay all necessary expenses for the employment of investigators, local and special agents, experts, assistants, and all labor and other necessary expenses, including rent, in the District of Columbia and elsewhere, as may he required: Provided, That of this sum not exceeding $10,000 shall be used in the study of the relation of insects to the chestnut-bark disease.

ENFORCEMENT OF THE PLANT QUARANTINE ACT: To enable the Secretary of Agriculture to carry into effect the provisions of the Act of August twentieth, nineteen hundred and twelve, entitled "An Act to regulate the importation of nursery stock and other plants and plant products; to enable the Secretary of Agriculture to establish and maintain quarantine districts for plant diseases and insect pests; to permit and regulate the movement of fruits, plants, and vegetables therefrom, and for other purposes." in the city of Washington and elsewhere, including official traveling expenses, telegraph and telephone service, express and freight charges, and all other expense, employing such assistants, clerks, and other person as may be considered necessary for the purposes named, $40,000, of which sum $10,000 shall be immediately available: Provided, That hereafter any class of nursery stock or of any other class of plant, fruit, vegetables, roots, bulbs, seeds, or other plant

products of which the importation may be forbidden from any country or locality under the provisions of section seven of the plant quarantine Act approved August twentieth, nineteen hundred and twelve (Thirty-seventh Statutes, page three hundred and fifteen) may be imported for experimental or scientific purpose by the Department of Agriculture upon such conditions and under such regulations as the said Secretary of Agriculture may prescribe.

To enable the Secretary of Agriculture to effect an exchange of Lands and indemnity rights with the State of Montana, $25,000, to be available until expended when the said State shall have appropriated a like amount to be used in cooperation with the Forest Service for the aforesaid purpose: Provided, That such exchanges shall be made on the basis of approximately equal area and value.

To enable the Secretary of Agriculture to acquire and to diffuse among the people of the United States useful information on subjects connected with the marketing and distributing of farm products, and for the employment of persons and means necessary in the city of Washington and elsewhere, there is hereby appropriated the sum of $50,000, of which sum $10,000 shall be immediately available.

That nothing contained in the Act making appropriations to provide for the expenses of the Government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes, approved June twenty-sixth nineteen hundred and twelve, shall be so construed as to prohibit the payment from the appropriations for the Department of Agriculture of expenses incidental to the delivery of lectures, the giving of instruction, or the acquiring of information at meetings by its employees on subjects relating to the work of the department authorized by law.

That hereafter section seven of the Act approved August twenty-sixth, nineteen hundred and twelve (Thirty-seventh Statutes, page six hundred and twenty-six), and any amendments thereto, shall not apply to the payment, out of moneys appropriated or which may be hereafter appropriated in lump sum for the Department of Agriculture, for personal services of employees engaged in strictly scientific or

technical work: Provided, That nothing contained herein shall be construed to authorize the transfer of any person employed at a specific salary and the payment of compensation from lump-sum appropriations at a rate greater than said specific salary.

And hereafter every officer or employee of the Department of Agriculture whose rate of compensation is specified herein shall receive compensation at the rate so specified.

To enable the Secretary of Agriculture to cooperate with and make an exhibit at the next annual meeting of the International Dry Land Congress, to be held at Tulsa, Oklahoma, during the fiscal year ending June thirtieth, nineteen hundred and fourteen, illustrative of the investigations, products, and processes relating to farming in the subhumid region of the United States, including labor and all expenses in the city of Washington and elsewhere, $20,000, to be immediately available.

For cooperation with any State or group of States in the protection from fire of the forested watersheds of navigable streams, under the provisions of section two of the Act of March first, nineteen hundred and eleven entitled "An Act to enable any State to cooperate with any other State or States, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable rivers," $75,000: Provided, That any and all unused balance of the sum of $200,000 heretofore appropriated by the Act of March first, nineteen hundred and eleven, to enable the Secretary of Agriculture to carry out the purposes mentioned in said section two, remaining unexpended July first, nineteen hundred and thirteen, shall continue available until the end of the fiscal year nineteen hundred and fifteen for the purpose for which it was appropriated.

That section nine of the Act of March first, nineteen hundred and eleven (Thirty-sixth Statutes, page nine hundred and sixty-one), entitled "An Act to enable any State to cooperate with any other State or States, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the

purpose of conserving the navigability of navigable rivers," be amended to read as follows:

"That such acquisition by the United States shall in no case be defeated because of located or defined rights of way, easements, and reservations, which, from their nature will, in the opinion of the National Forest Reservation Commission and the Secretary of Agriculture, in no manner interfere with the use of the lands so encumbered, for the purposes of the Act: Provided, That such rights of way, easements, and reservations retained by the owner from whom the United States receives title, shall be subject to the rules and regulations prescribed by the Secretary of Agriculture for their occupation, use, operation, protection, and administration, and that such rules and regulations shall be expressed in and made part of the written instrument conveying title to the lands to the United States; and the use, occupation, and operation of such rights of way, easements, and reservations shall be under, subject to, and in obedience with the rules and regulations so expressed."

That the President of the United States shall appoint a commission composed of not more than seven persons who shall serve without compensation to cooperate with the American commission assembled under the auspices of the Southern Commercial Congress to investigate and study in European countries cooperative land-mortgage banks, cooperative rural credit unions, and similar organizations and institutions devoting their attention to the promotion of agriculture and the betterment of rural conditions, and for the purpose of its investigations the commission shall be authorized to incur and have paid upon the certificate of its chairman such expenses in the city of Washington and elsewhere for the payment of the salaries of employees, clerks, stenographers, assistants and such other necessary expenses as the commission may deem necessary: Provided, That the total expense incurred for all purposes shall not exceed the sum of $25,000, and the said commission shall submit a report to Congress as early as practicable, embodying the results of its investigations and such recommendations as it may see fit to make.

Total carried by this bill for the Department of Agriculture,

$17,986,945
Approved, March 4, 1913.

CHAP. 348.- An Act To provide for the protection of forest lands, for the reforestation of denuded areas, for the extension of national forests, and for other purposes, in order to promote the continuous production of timber on lands chiefly suitable therefore

Be it enacted by the Senate and House of Representatives of the United Suites of America in Congress assembled, That the Secretary of Agriculture is hereby authorized and directed, in cooperation with appropriate officials of the various States or other suitable agencies, to recommend for each forest region of the United States such systems of forest fire prevention and suppression as will adequately protect the timbered and cut-over lands therein with a view to the protection of forest and water resources and the continuous production of timber on lands chiefly suitable therefore.

Sec. 2. That if the Secretary of Agriculture shall find that the system and practice of forest fire prevention and suppression provided by any State substantially promotes the objects described in the foregoing section, be is hereby authorized and directed, under such conditions as he may determine to be fair and equitable in each State, to cooperate with appropriate officials of each State, and through them with private and other agencies therein, in the protection of timbered and forest-producing lands from fire. In no case other than for preliminary investigations shall the amount expended by the Federal Government in any State during any fiscal year, under this section, exceed the amount expended by the State for the same purpose during the same fiscal year, including the expenditures of forest owners or operators which are required by State law or which are made in pursuance of the forest protection system of the State under State supervision and for which in all cases the State renders satisfactory accounting. In the cooperation extended to the several States due consideration shall be given to the

protection of watersheds of navigable streams, but such cooperation may, in the discretion of the Secretary of Agriculture, be extended to any timbered or forest producing lands within the cooperating States.

Sec. 3. That the Secretary of Agriculture shall expend such portions of the appropriations authorized herein as he deems advisable to study the effects of tax laws, methods, and practices upon forest perpetuation, to cooperate with appropriate officials of the various States or other suitable agencies in such investigations and in devising tax laws designed to encourage the conservation and growing of timber, and to investigate and promote practical methods of insuring standing timber on growing forests from losses by fire and other causes. There is hereby authorized to be appropriated annually, out of any money in the Treasury not otherwise appropriated, not more than $2,500,000, to enable the Secretary of Agriculture to carry out the provisions of sections 1, 2, and 3 of this Act.

Sec. 4. That the Secretary of Agriculture is hereby authorized and directed to cooperate with the various States in the procurement, production, and distribution of forest-tree seeds and plants, for the purpose of establishing wind breaks, shelter belts, and farm wood lots upon denuded or nonforested lands within such cooperating States, under such conditions and requirements as he may prescribe to the end that forest-tree seeds or plants so procured, produced, or distributed shall be used effectively for planting denuded or nonforested lands in the cooperating States and growing timber therein: Provided, That the amount expended by the Federal Government in cooperation with any State during any fiscal year for such purposes shall not exceed the amount expended by the State for the same purposes during the same fiscal year. There is hereby authorized to be appropriated annually, out of any money in the Treasury not otherwise appropriated, not more than $100,000, to enable the Secretary of Agriculture to carry out the provisions of this section.

Sec. 5. That the Secretary of Agriculture is hereby authorized and directed, in cooperation with appropriate officials of the various States or, in his discretion, with other suitable agencies, to assist the owners of farms in establishing,

improving, and renewing woodlots, shelter belts, windbreaks, and other valuable forest growth, and in growing and renewing useful timber crops: Provided, That, except for preliminary investigations, the amount expended by the Federal Government under this section in cooperation with any State or other cooperating agency during any fiscal year shall not exceed the amount expended by the State or other cooperating agency for the same purpose during the same fiscal year. There is hereby authorized to be appropriated annually out of any money in the Treasury not otherwise appropriated, not more than $100,000 to enable the Secretary of Agriculture to carry out the provisions of this section.

Sec. 6. That section 6 of the Act of March 1, 1911 (Thirty-sixth Statutes at Large, page 961), is hereby amended to authorize and direct the Secretary of Agriculture to examine, locate and recommend for purchase such forested, cut-over or denuded lands within the watersheds of navigable streams as in his judgment may be necessary to the regulation of the flow of navigable streams or for the production of timber and to report to the National Forest Reservation Commission the results of such examination: but before any lands are purchased by the commission said lands shall be examined by the Secretary of Agriculture, in cooperation with the Director of the Geological Survey, and a report made by them to the commission showing that the control of such lands by the Federal Government will promote or protect the navigation of streams or by the Secretary of Agriculture showing that such control will promote the production of timber thereon.

Sec. 7. That to enable owners of lands chiefly valuable for the growing of timber crops to donate or devise such lands to the United States in order to assure future timber supplies for the agricultural and other industries of the State or for other national forest purposes, the Secretary of Agriculture is hereby authorized, in his discretion, to accept on behalf of the United States title to any such land so donated or devised, subject to such reservations by the donor of the present stand of merchantable timber or of mineral or other rights for a period not exceeding twenty years as the Secretary of Agriculture may find to be reasonable and not detrimental to

the purposes of this section, and to pay out of any moneys appropriated for the general expenses of the Forest Service the cost of recording deeds or other expenses incident to the examination and acceptance of title. Any lands to which title is so accepted shall be in units of such size or so located as to be capable of economical administration as national forests either separately or jointly with other lands acquired under this section, or jointly with an existing national forest.

All lands to which title is accepted under this section shall, upon acceptance of title, become national forest lands, subject to all laws applicable to lands acquired under the Act of March 1, 1911 (Thirty-sixth Statutes at Large, page 961), and amendments thereto. In the sale of timber from national forest lands acquired under this section preference shall be given to applicants who will furnish the products desired therefrom to meet the necessities of citizens of the United States engaged in agriculture in the States in which such national forest is situated: Provided, That all property, rights, easements, and benefits authorized by this section to be retained by or reserved to owners of lands donated or devised to the United States shall be subject to the tax laws of the States where such lands are located.

Sec. 8. That the Secretary of Agriculture is hereby authorized to ascertain and determine the location of public lands chiefly valuable for stream-flow protection or for timber production, which can be economically administered as parts of national forests, and to report his findings to the National Forest Reservation Commission established under the Act of March 1, 1911 (Thirty-sixth Statutes at Large, page 961), and if the commission shall determine that the administration of said lands by the Federal Government will protect the flow of streams used for navigation or for irrigation, or will promote a future timber supply, the President shall lay the findings of the commission before the Congress of the United States.

Sec. 9. That the President, in his discretion, is hereby authorized to establish as national forests, or parts thereof, any lands within the boundaries of Government reservations, other than national parks, reservations for phosphate and other mineral deposits or water-power purposes, national monuments, and Indian reservations, which in the opinion of

the Secretary of the department now administering the area and the Secretary of Agriculture are suitable for the production of timber, to be administered by the Secretary of Agriculture under such rules and regulations and in accordance with such general plans as may be jointly approved by the Secretary of Agriculture and the Secretary formerly administering the area, for the use and occupation of such lands and for the sale of products therefrom. That where such national forest is established on land previously reserved for the Army or Navy for purposes of national defense the land shall remain subject to the unhampered use of the War or Navy Department for said purposes, and nothing in this section shall be construed to relinquish the authority over such lands for purposes of national defense now vested in the Department for which the lands were formerly reserved. Any moneys available for the maintenance, improvement, protection, construction of highways and general administration of the national forests shall be available for expenditure on the national forests created under this section. All receipts from the sale of products from or for the use of lands in such national forests shall be covered into the Treasury as miscellaneous receipts, forest reserve fund, and shall be disposed of in like manner as the receipts from other national forests as provided by existing law. Any person who shall violate any rule or regulation promulgated under this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $500 or imprisoned for not more than one year, or both.

Approved, June 7, 1924.

CHAP. 375.—An Act To amend an Act entitled "An Act to consolidate national forest lands."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of March 20, 1922 (Forty-second Statutes at Large, page 465), entitled "An Act to consolidate national forest lands", be and the same is hereby, amended by adding the following section thereto:

Sec. 2. Either party to an exchange may make reservations of timber, minerals, or easements, the values of which shall be duly considered in determining the values of the exchanged lands. Where reservations are made in lands conveyed to the United States the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary by the Secretary of Agriculture; where mineral reservations are made in lands conveyed by the United States it shall be so stipulated in the patents, and that any person who acquires the right to mine and remove the reserved deposits may enter and occupy so much of the surface as may be required for all purposes incident to the mining and removal of the minerals therefrom, and may mine and remove such minerals upon payment to the owner of the surface for damages caused to the land and improvements thereon: Provided, That all property, rights, easements, and benefits authorized by this section to be retained by or reserved to owners of lands conveyed to the United States shall be subject to the tax laws of the States where such lands are located.

Approved, February 28, 1925.

CHAP. 473.—An Act To amend section 7 of an Act entitled "An Act to enable any State to cooperate with any other State or States, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable rivers," approved March 1, 1911 (Thirty-sixth Statutes at Large, page 961).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 7 of an Act entitled "An Act to enable any State to cooperate with any other State or States, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable rivers," approved March 1, 1911, be, and the same is hereby, amended by adding the following proviso thereto:
"Provided further, That with the approval of the National Forest Reservation Commission as provided by sections 6 and 7 of this Act, and when the public interests will be benefited thereby, the Secretary of Agriculture be, and hereby is, authorized, in his discretion, to accept on behalf of the United States title to any lands within the exterior boundaries of national forests acquired under this Act which, in his opinion, are chiefly valuable for the purposes of this Act, and in exchange therefore to convey by deed not to exceed an equal value of such national forest land in the same State, or he may authorize the grantor to cut and remove an equal value of timber within such national forests in the same State, the values in each case to be determined by him: And provided further, That before any such exchange is effected notice of the contemplated exchange reciting the lands involved shall be published once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in some like newspaper published in any count in which may be situated any lands or timber to be given in such exchange. Timber given in such exchanges shall be cut and removed under the laws and regulations relating to such national forests, and under the direction and

supervision and in accordance with the requirements of the Secretary of Agriculture. Lands so accepted by the Secretary of Agriculture shall, upon acceptance, become parts of the national forests within whose exterior boundaries they are located, and be subject to all the provisions of this Act."
Approved, March 3, 1925.

ACT No. 315.

By Mr. Jack

House Bill No. 255

AN ACT

Providing that when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and the act of acquisition, verdict or judgment contains a reservation of oil, gas and/or other minerals or royalties, or provides that said land passes subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still extant, said rights so reserved or previously sold shall be imprescriptible; and repealing Acts 68 and 151 of 1938 and other laws, general or special, inconsistent herewith.

Section 1. Be it enacted by the Legislature of Louisiana, That when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall he imprescriptible

Section 2. That Act 68 and Act 151 of 1938 and all other laws or parts of laws, general or special, in conflict herewith are hereby repealed.

Approved by the Governor: July 20, 1940.

Supreme Court, U.S.
FILED
AUG 12 2002
CLERK

No. 01-1799

In the Supreme Court of the United States

CENTRAL PINES LAND COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
THOMAS L. SANSONETTI
Assistant Attorney General
JOHN A. BRYSON
JOHN L. SMELTZER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

In the 1930s, the United States acquired lands in Louisiana for the Kisatchie National Forest. At the time of acquisition, the lands were burdened by a mineral servitude that, under state law, was subject to prescription for non-use. In 1940, the Louisiana legislature enacted Act 315 to eliminate the rule of prescription for servitudes on land acquired or held by the United States.

The question presented is whether the court of appeals erred in holding, under choice-of-law principles, that the pre-existing Louisiana law of prescription, rather than Act 315, governed prescription of mineral servitudes on federal lands purchased in Louisiana prior to the passage of Act 315.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Clearfield Trust Co. v. *United States*, 318 U.S. 363 (1943)	4
Frost-Johnson Lumber Co. v. *Salling's Heirs*, 91 So. 207 (La. 1920)	2
Leiter Minerals, Inc. v. *California Co.*, 132 So.2d 845 (La. 1961)	4
O'Melveny & Myers v. *FDIC*, 512 U.S. 79 (1994)	8
United States v. *Burnison*, 339 U.S. 87 (1950)	12
United States v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973)	4, 5, 7, 8, 9, 10, 11, 12
United States v. *Standard Oil Co.*, 332 U.S. 301 (1947)	10, 11

Statutes and regulations:

Act of Mar. 1, 1911 (Weeks Forestry Act), ch. 186, 36 Stat. 961 (16 U.S.C. 480, 500, 515-519, 521, 522, 563)	3
§ 6, 36 Stat. 962 (16 U.S.C. 515)	12
§ 9, 36 Stat. 962 (16 U.S.C. 518)	12
La. Rev. Stat. Ann. (West 2000):	
§ 31:21	2
§ 31:27	2
§ 31:149 (Acts 1940, No. 315)	2, 4, 5, 6, 7, 8, 10

In the Supreme Court of the United States

No. 01-1799

CENTRAL PINES LAND COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 274 F.3d 881. The opinions of the district court (Pet. App. 27a-51a, 52a-78a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 2001. A petition for rehearing was denied March 8, 2002 (Pet. App. 79a-80a). The petition for writ of certiorari was filed on June 6, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Central Pines Land Company, et al. brought this quiet title action to obtain a declaration of ownership of mineral servitudes on federal lands in Louisiana comprising portions of the Kisatchie National Forest and the Fort Polk Army Base. In asserting ownership of those servitudes, petitioners relied on Louisiana Act 315 of 1940 (La. Rev. Stat. Ann. § 31:149 (West 2000)), which purported to render mineral servitudes on federal land exempt from the longstanding Louisiana rule of prescription for non-use. The district court held under choice-of-law principles that Act 315 could be applied prospectively to servitudes on the Fort Polk land that were created after enactment of Act 315, but could not be applied retroactively to the servitude on the Kisatchie National Forest land created before the passage of the Act. The court of appeals affirmed.

1. Under Louisiana law, ownership of minerals on real property cannot be held as an estate separate from the land, but the right to enter the land and extract minerals can be held separately in the form of a mineral servitude. *Frost-Johnson Lumber Co.* v. *Salling's Heirs*, 91 So. 207, 243-245 (La. 1920); La. Rev. Stat. Ann. § 31:21 (West 2000). Under Louisiana law, rights of servitude ordinarily prescribe (*i.e.*, revert to the landowner) if not used for a period of ten years. *Frost-Johnson Lumber*, 91 So. at 243-245; La. Rev. Stat. Ann § 31:27 (West 2000).

2. The land at issue in this case was originally part of a 100,000-acre tract owned by the Gulf Lumber Company. In 1929, Gulf Lumber sold mineral rights in the tract to S.H. Fullerton, creating a mineral servitude. In 1937, Fullerton conveyed the servitude to William T. Burton, who subsequently transferred his

interests to Burton Industries. Pet. App. 4a. In 1988, petitioners acquired from Burton Industries any rights remaining in the 1929 servitude. Gov't C.A. Br. 11-12.

The lands at issue here comprise a portion of the Kisatchie National Forest. The United States acquired the lands pursuant to the Act of Mar. 1, 1911 (Weeks Forestry Act), ch. 186, 36 Stat. 961 (codified at 16 U.S.C. 480, 500, 515-519, 521, 552, 563), in a series of four transactions between 1933 and 1938. Gulf Lumber Company sold the United States approximately 36,000 acres in two transactions in 1933 and 1936. The United States acquired an additional 161 acres through a stipulated sale and a judgment of condemnation in 1938.[1] Gov't C.A. Br. 12.

All four of the transactions were expressly subject to the outstanding mineral servitude then held by Fullerton, and reflected the parties' recognition that the mineral servitude was subject to prescription for non-use. An appraisal report prepared prior to the 1933 sale stated that the minerals on the land were "reserved for a period of 10 years." See Gov't C.A. Br. 13. In accord with Forest Service appraisal guidelines, the appraised value of the land ($1.50 per acre) was reduced 10 cents per acre, or 1 cent per acre for each year of the servitude. *Ibid.* The instruments of transfer for the three 1936 and 1938 conveyances also contained provisions acknowledging that the 1929 mineral servitude was subject to prescription. Specifically, the instruments contained mineral reservations in favor of seller Gulf Lumber that would become effective only upon

---

[1] The United States acquired additional tracts of lands from Burton in a series of transactions between 1942 and 1981 that comprise a portion of the Fort Polk Army Base. Title to mineral servitudes on those lands is not at issue before this Court.

prescription of the 1929 servitude, and that contained their own detailed terms of prescription for non-use. *Id.* at 13-14.

3. In 1940, the Louisiana legislature enacted Act 315, which provides that when land acquired by the United States is subject to a mineral servitude, that servitude is "imprescriptible" for non-use. The asserted purpose of the Act was to facilitate the United States' acquisition of land for national forests and parks and military installations by permitting reluctant sellers to avoid losing any retained mineral rights through prescription. See *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 599 & n.16 (1973). Act 315 also served Louisiana's interest in taxing and regulating minerals on federal land by preventing ownership of minerals from reverting to the United States. See *id.* at 599-600. The Louisiana Supreme Court has held that Act 315 is "retrospective in its operation," and applies to mineral servitudes in existence at the time of its passage. *Leiter Minerals, Inc.* v. *California Co.*, 132 So.2d 845, 854 (1961).

4. In *United States* v. *Little Lake Misere Land Co.*, *supra*, this Court invoked the choice-of-law doctrine outlined in *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), to hold that Louisiana's Act 315 could not be applied retroactively to mineral reservations on lands acquired by the United States under the Migratory Bird Conservation Act. 412 U.S. at 602-603. In two transactions completed in the 1930s, the United States granted mineral reservations to the vendor of the land, subject to a contractual provision calling for the servitudes to expire if not used in a particular fashion for a period of ten years. Because Act 315 would deprive the United States of "bargained-for contractual interests" by abrogating the terms of the

acquisition instruments relating to prescription, the Court held that the Act was "plainly hostile to the interests of the United States" and could not be "borrowed" as the rule of decision. *Id.* at 597. This Court held that the appropriate rule of decision was to be supplied by either federal common law or "residual" state law (*i.e.*, Louisiana state law without Act 315), both of which would give effect to the contract terms. *Id.* at 604.

5. In 1992, the U.S. Bureau of Land Management began granting mineral leases for minerals under some Kisatchie Forest lands that had been subject to the 1929 servitude. Respondents Texaco Exploration and Production, Inc., Swift Energy Company, Chesapeake Operating, Inc., C.H.C. Gerard, and RME Petroleum Company are the current lessees of those mineral rights. Petitioners filed suit seeking to quiet title to the mineral servitudes on the lands within Kisatchie Forest and Fort Polk and a declaration that leases granted by the United States were invalid. Both parties moved for summary judgment.

The district court granted summary judgment to the government with respect to the Kisatchie Forest lands. Pet. App. 27a-52a. Citing this Court's decision in *Little Lake Misere Land Co., supra*, the court held that Act 315 could not be applied retroactively to render the 1929 servitude imprescriptible. Pet. App. 33a-38a. The court noted the detailed and specific provisions of the contracts with respect to mineral reservations and concluded that they were "inconsistent with [an] * * * expectation that the reservations would be subject to modification by retroactive application of state law." *Id.* at 36a-37a. The court held that the otherwise-prevailing Louisiana law of prescription would apply, and that the servitudes on the Kisatchie Forest lands

had prescribed for non-use for ten years.[2] *Id.* at 38a. The district court granted petitioners summary judgment with respect to the Fort Polk lands, holding that Act 315 could be applied prospectively to render mineral servitudes on those lands imprescriptible. *Id.* at 38a-43a.

6. The court of appeals affirmed (Pet. App. 1a-26a). The court began with the proposition that "state law should supply the federal rule unless there is an expression of legislative intent to the contrary, or * * * a showing that state law conflicts significantly with any federal interests or policies present in this case." Pet. App. 10a (footnote omitted). The court held that Act 315 could not be borrowed as the rule of decision because, as in *Little Lake Misere*, it was hostile to the United States' interest in "obtaining the mineral rights via the default rule of prescription in place before Act 315." *Id.* at 11a. Although the government itself contracted over the terms of the mineral servitudes in *Little Lake Misere* and merely succeeded to the servient estate in this case, the court of appeals held that distinction immaterial because in both cases "the acquisition subject to the existing servitude created a federal interest in the potential prescription of the mineral servitude * * * via the rule of prescription in place at the time of contract." *Id.* at 8a. The court concluded that the "state interest in the retroactive application of Act 315 does not outweigh the federal

---

[2] After additional proceedings, the district court also held (Pet. App. 52a-78a) that a mineral moratorium instituted by the government between 1950 and 1978 did not suspend prescription because it did not cover all of the land subject to the servitude. *Id.* at 66a-69a. In addition, the court held that there was no suspension of prescription by obstacle after the moratorium ended in 1978. *Id.* at 69a-72a.

interest in this case" (*id.* at 12a), because the "main justification" for Act 315, the facilitation of federal land acquisitions, "has no bearing" on property already acquired. *Ibid.* The court held that the 10-year prescriptive period of "residual Louisiana law" should govern the case, and concluded that petitioners' servitude on the Kisatchie Forest lands had prescribed for nonuse.[3] *Id.* at 12a-13a, 15a-18a.

ARGUMENT

The court of appeals correctly applied the choice-of-law analysis of *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973), to the "fundamental[ly] similar[]" (Pet. App. 9a) circumstances of this case. Its decision does not conflict with any decision of this Court or of any other court of appeals. The court of appeals' factbound choice-of-law ruling, which applies only to mineral servitudes on real property acquired by the United States in Louisiana before 1940, does not warrant this Court's review.

1. Petitioners contend (Pet. 12-17) that there is no significant conflict between a federal interest and the application of state law so as to justify the application of a federal rule of decision. Petitioners do not contend that the court of appeals applied incorrect choice-of-law principles, but simply claim that the court misapplied established principles to the particular facts of this

---

[3] Although the court was "sympathetic to the Government's argument" that prospective application of Act 315 to the mineral servitudes on the Fort Polk lands constituted unconstitutional discrimination against the United States, it held that claim was foreclosed by binding circuit precedent. Pet. App. 13a. Accordingly, it held that Act 315 rendered the servitudes on the Fort Polk lands imprescriptible.

case. That claim is without merit, and in any event does not warrant further review.

The court of appeals' decision was a straightforward application of the established principle, followed in *Little Lake Misere*, that federal courts may fashion a federal rule of decision when application of state law would significantly conflict with a federal policy or interest. See *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994). The court of appeals correctly determined that retroactive application of Act 315 would significantly conflict with the valid federal interest in the "application of default legal rules in place at the time of contract." Pet. App. 11a. As the court observed, the "federal interest in the potential prescription of the mineral servitude * * * via the rule of prescription in place at the time of contract" was "evidenced by the bargaining" that occurred at the time of the transactions. *Id.* at 8a. As discussed above, the purchase price for the land acquired in the 1933 transaction reflected the parties' understanding that the servitude would expire, and in the other three transactions, the United States expressly granted Gulf Lumber additional reversionary mineral interests that would vest upon prescription of the 1929 servitude, and which themselves would revert to the United States subject to explicit contractual terms of prescription. The court of appeals correctly recognized that Louisiana does not have an overriding interest in the application of Act 315 in this case. While petitioners insist that "Act 315 was passed to assist the United States" (Pet. 14), as this Court stated in *Little Lake Misere*, the Act "cannot 'facilitate' transactions already consummated." 412 U.S. at 599.

Petitioners err in suggesting that adherence to the default rules on which contractual negotiations were

based is little more than an illegitimate "interest in always winning law suits." Pet. 12. As petitioners concede (Pet. 13), default rules do not necessarily favor the United States. This Court has recognized, however, that there is a legitimate federal interest in ensuring that the terms of land acquisitions are not changed after the fact. As the Court wrote in *Little Lake Misere*, "[c]ertainty and finality are indispensable in any land transaction," and "are especially critical when, as here, the federal officials carrying out the mandate of Congress [to acquire lands] irrevocably commit scarce funds" (412 U.S. at 597) based on the law then in existence.[4]

The value of the reversionary rights in the present case is self-evident. The rule of prescription in place at the time of acquisition allows the United States to control the terms of any future mineral exploration or extraction on the lands after reversion and to conduct long-term planning for the Kisatchie National Forest without the need to accommodate persons who may in the future attempt to exercise rights under long-dormant mineral servitudes. Petitioners' claim that Act 315 cannot conflict with a federal interest because its reversionary interest in acquiring the minerals is

---

[4] Petitioners suggest that before a federal rule of decision can be created, there must be a showing that "continued private ownership of minerals on lands acquired by it under the Weeks Forestry Act somehow interfered with or undermined the implementation of federal policies relating to the use or management for which the lands were acquired." Pet. 13; see Pet. 16. However, this Court undertook no such detailed inquiry in *Little Lake Misere*, and instead focused on the general importance of certainty and finality under land acquisition programs, including the Migratory Bird Conservation Act at issue there. 412 U.S. at 597-598.

"only a hope or expectancy * * * which cannot be legally bought or sold" and which would not be a property right to "[a]ny other land purchaser" (Pet. 8-9) is squarely foreclosed by *Little Lake Misere*. There, the Court held that "whether Louisiana recognizes the interests at stake here as transferable interests in real property, as such, has no bearing on our conclusion" that retroactive application of Act 315 "would be adverse to the United States." 412 U.S. at 601-602.

2. Petitioners' attempts to distinguish *Little Lake Misere* are unavailing.

a. Petitioners contend (Pet. 8-12) that federal law should not determine the rule of decision in this case because in contrast to *Little Lake Misere*, the servitude in this case was created not by the land acquisition agreement with the government, but rather the 1929 deed between Gulf Lumber and S.H. Fullerton. Petitioners argue that because the government was not a party to the contract creating the servitude, there is no federal right in determining the circumstances under which that servitude is subject to prescription. Pet. 9. The court of appeals correctly rejected that argument, noting the "fundamental similarit[y]" between "the federal interest at stake in *Little Lake [Misere]*" and here. Pet. App. 9a. As the court of appeals explained, "[t]he Government's contract 'right' [in *Little Lake Misere*] was to obtain the mineral rights after the *contractual* prescriptive period had elapsed. Similarly, in this case the Government's right is to obtain the mineral rights after the *default* prescriptive period has elapsed." *Ibid.* The underlying right of reversion is the same, and "[t]his right, as in *Little Lake [Misere]*, is federal." *Ibid.*

This Court's decision in *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947) (see Pet. 6, 9), is not to the

contrary. There, the Court held that federal law, rather than state tort law, governed adjudication of a suit by the United States for injuries to a soldier caused by the negligent operation of a truck. The Court suggested in *dicta* that federal policy would not be implicated "where the Government has simply substituted itself for others as successor to rights governed by state law." 332 U.S. at 309. Here, however, the government has not simply been substituted as a successor to rights governed by state law—if that were the case, there is no question that the transaction would be governed by generally applicable Louisiana law requiring prescription for non-use after 10 years. After the substitution in this case, however, the state passed a law retroactively altering the mineral interests of only a single landowner—the United States. Nothing in *Standard Oil* requires that federal courts must, through choice-of-law decisions, give retroactive effect to legislation altering the rights of the United States.[5]

b. Petitioners' claim (Pet. 10) that the Weeks Forestry Act does not "explicit[ly] authoriz[e]" the United States to acquire minerals when acquiring National Forest land. That feature does not distinguish the Weeks Forestry Act from the Migratory Bird Conservation Act at issue in *Little Lake Misere*. As the Court explained there, the relevant consideration is whether the statute explicitly authorized the underlying

---

[5] Petitioners err in suggesting that the government is seeking to be put in a "better position than other Louisiana landowners." Pet. 10. Rather, the government has sought the application of the neutral rules of law that applied to all landowners at the time it purchased the land at issue. It is petitioners who are seeking to use the substitution of the United States to obtain an enhanced mineral interest—a perpetual mineral servitude unknown to the law of Louisiana at the time of contract.

purchase of land through the "land acquisition agreement." 412 U.S. at 594. There is no question the Weeks Forestry Act satisfies that requirement.[6] See 16 U.S.C. 515. Petitioners' claim that the transactions here do not "aris[e] from and bear[] heavily upon a federal regulatory program" (Pet. 10 (quoting *Little Lake Misere*, 412 U.S. at 592)) fails for similar reasons. When this Court described the acquisition in *Little Lake Misere* as one "arising from and bearing heavily upon a federal regulatory program," 412 U.S. at 592, the Court did not refer to any particular aspect of the federal regulatory program under the Migratory Bird Conservation Act that is not also present in this case. The regulatory program involved in acquiring land for and operating a wildlife refuge is manifestly similar to the program involved in acquiring land for and operating a National Forest, and petitioners offer no basis for distinguishing the two programs.[7]

---

[6] Moreover, the Secretary's power to acquire mineral interests along with land, even if not "explicit" in the Weeks Forestry Act, is very clearly implied by it. The Weeks Forestry Act gave the Secretary of Agriculture discretion to allow mineral reservations on lands acquired by the United States for National Forests. See ch. 186, § 9, 36 Stat. 962 (*reprinted* at Pet. App. 89a). Discretion to allow mineral reservations necessarily implies the exercise of discretion *not* to allow such reservations, *i.e.*, to acquire ownership rights in minerals.

[7] Petitioners' citation (Pet. 11) to *United States* v. *Burnison*, 339 U.S. 87 (1950), is inapposite. There, the Court upheld the constitutionality of a California probate law prohibiting residents from making testamentary gifts to entities other than ones specified by statute, which did not include the United States. The Court held that the statute was not unconstitutionally discriminatory because it acted "upon the power of its domiciliary to give and not on the United States' power to receive." *Id.* at 91. *Burnison* did not involve a choice-of-law determination or the retroactive application

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
THOMAS L. SANSONETTI
Assistant Attorney General
JOHN A. BRYSON
JOHN L. SMELTZER
Attorneys

AUGUST 2002

---

of a law to a completed transaction, nor was there any suggestion that the law interfered with a federal program.

Supreme Court, U.S.
FILED
AUG 2 2 2002
OFFICE OF THE CLERK

(3)

No. 01-1799

In the

Supreme Court of the United States

CENTRAL PINES LAND COMPANY; TOWER MINERALS COMPANY, INC.; JACK E. LAWTON, JR.; EVELYN GAY LAWTON DUHON; LINDA LEW LAWTON DROST; D, S & T, INC; and DROST & BRAME, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA; TEXACO EXPLORATION AND PRODUCTION INC.; SWIFT ENERGY COMPANY; CHESAPEAKE OPERATING, INC.; C. H. C. GERARD; and RME PETROLEUM COMPANY,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

KIM G. MAYHALL
THOMAS C. McKOWEN, IV
Strain, Dennis, Mayhall & Bates, L.L.P.
318 St. Charles Street
Baton Rouge, LA 70802
(225) 343-0100

A. J. GRAY, III
Counsel of Record
The Gray Law Firm, PLC
P. O. Box 1467
Lake Charles, LA 70602
(337) 494-0694

THAD D. MINALDI
101 N. Huntington Street
Sulphur, LA 70663
(337) 527-5221

Attorneys for Petitioners

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

11pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

CLEARFIELD TRUST CO. V. UNITED STATES, 318 U.S. 363 (1943) 5

UNITED STATES V. LITTLE LAKE MISERE LAND CO., 412 U.S. 580 (1973) 4, 5, 6

UNITED STATES V. STANDARD OIL CO. OF CALIFORNIA, 332 U.S. 301 (1947) 2

WHITNEY NATIONAL BANK V. LITTLE CREEK OIL CO., 212 LA. 949, 33 SO.2D 693 (1947) 3

STATUTES

Louisiana Act 315 of 1940 ..... 3, 4, 5, 6

IN THE
SUPREME COURT OF THE UNITED STATES

No. 01-1799

CENTRAL PINES LAND COMPANY; TOWER MINERALS COMPANY, INC.; JACK E. LAWTON, JR.; EVELYN GAY LAWTON DUHON; LINDA LEW LAWTON DROST; D, S & T, INC.; and DROST & BRAME, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA; TEXACO EXPLORATION AND PRODUCTION INC.; SWIFT ENERGY COMPANY; CHESAPEAKE OPERATING, INC.; C. H. C. GERARD; and RME PETROLEUM COMPANY,

Respondents.

REPLY BRIEF FOR PETITIONERS

ARGUMENT

Although the Court of Appeals for the Fifth Circuit used the proper federal choice-of-law rules, its ruling totally ignored them. The Court applied federal common law to a contractual relationship to which the United States was never a party. Petitioners are aware of no other case which applied federal law in such a situation. Respondent has not cited any such case. This lack of case authority may be because, in one of the early federal common law cases, albeit in *dicta*, this Court directly foreclosed the application of federal common law where the United States simply substituted itself for

another party as successor to rights governed by state law. ***United States v. Standard Oil Co. of California***, 332 U.S. 301, 309 (1947). If the reach of federal common law is to be extended beyond any past precedent, such extension should be decided by this Court.

But in any event, no significant conflict between a federal interest and state law has been shown. There is clearly no federal interest in default rules of law. As respondent states: "default rules do not necessarily favor the United States" (Opp. 9). The federal interest constructed by the Fifth Circuit is clearly non-existent. Furthermore, the more limited federal interest "in ensuring that the terms of land acquisitions are not changed after the fact," simply does not apply to the facts of this case (Opp. 9). If negotiations by the United States with one party about property of another party creates federal rights of the United States in said property (as respondent argues (Opp. 8)), there is no limit to the reach of federal common law.

This case is of significant importance, not only to the owners of mineral servitudes affecting over 435,000 acres in Louisiana, but to everyone whose property may have been of interest to the United States, now or in the past. If the Fifth Circuit opinion stands, simple interest in property by the United States will result in federal law being applicable thereto, without even notice to the property owner.

A. Federal Common Law Does Not Apply to a Contract Between Private Individuals

The United States "substituted itself for others as successor to rights governed by state law" in this case. ***Standard Oil Co.***, *supra*. (Gulf Lumber Company sold all of the mineral rights to a third party, plaintiffs' ancestor, four years before the first sale of the property from Gulf to the Government. The Government merely "stepped into the shoes" of Gulf as landowner subject to the outstanding mineral rights.) The Government does not dispute this fact; nor does it assert that this Court's *dicta* pronouncement in ***Standard Oil*** that in such cases, state law is to be applied, is

incorrect (Opp. 11). The Government argues that here the United States did not "simply" substitute itself; there was an additional fact -- the passage of a law affecting the Government's expectations -- which renders this rule of law inapplicable. The Government calls its expectations "mineral interests." However, these expectations could only be mineral interests if they already were subject to federal law. Under Louisiana state law, such expectations were clearly not mineral interests or property interests (Pet. 8-9). Therefore, the Government's position must be that even before Act 315 of 1940 was passed, federal law applied and gave it federal rights in the minerals. The United States could not have had state law rights in the minerals -- there were no legal rights under state law in its expectations. The result in this case is directly at odds with this Court's pronouncement in ***Standard Oil***.

Although the statement is *dicta*, the Government has not cited a case holding to the contrary. Likewise, it has not given a rationale as to why the United States, when substituting itself for others, *should* have greater rights than the prior party. Correct *dicta* is not be disregarded or rejected simply because it is *dicta*.

The Government asserts that ***Standard Oil*** does not require that retroactive effect be given to state legislation altering the rights of the United States (Opp. 11). It does not require it, but it does not prohibit it. As we have stated, ***Standard Oil*** does declare that where the United States has simply substituted itself for others, its rights are controlled by state law. If Act 315 of 1940 had declared that all mineral rights bearing upon all lands in Louisiana were no longer subject to prescription, would the rights of the United States have been affected by the change? Such a change would have been valid as to existing rights because it simply abolishes a rule of prescription which had not run, which rule had been based upon a presumption of abandonment. ***Whitney National Bank v. Little Creek Oil Co.***, 212 La. 949, 33 So.2d 693 (1947). If the change in law is otherwise valid, the rights of the United States would and should be affected. Its rights should be no greater than those of anyone

else.

The Court of Appeal must have ruled that if such a universal change occurred, all outstanding mineral rights, except those affecting lands of the United States, would become imprescriptible. Those mineral rights affecting lands owned by the United States would remain subject to the old law of prescription -- which law would then exist only for lands of the United States. Where the Government's argument is viewed from this perspective, it is obvious that it is just an argument for "more money."

Obviously, the United States *is* asking to be treated better than other landowners. It wants to be able to pick and choose those laws which will apply to it. Other landowners cannot escape valid laws. On what basis can the United States? If the United States wants to challenge Art. 315 of 1940, it may do so. But to do so on the basis of state law being inapplicable flies in the face of all of this Court's federal common law jurisprudence, as pointed out in our Petition for Certiorari.

Respondent totally misunderstands our statement that the Weeks Forestry Art did not explicitly authorize the acquisition of mineral rights separately from the land. We agree that both the Weeks Forestry Art and the Migratory Bird Conservation Act authorized the acquisition of minerals as part of land acquisitions (Opp. 12 n.6). However, in the instant case, the mineral rights were separately owned. Respondent has pointed to no provision of the Weeks Forestry Act authorizing or requiring separate mineral acquisitions. In ***Little Lake***, the mineral rights were being acquired with the land by contract. ***United States v. Little Lake Misere Land Co.***, 412 U.S. 580 (1973). There was a federal contract directly affecting the mineral rights. In the instant case, the land acquisition could not affect the mineral rights. The mineral rights were owned by a third party. In the instant case, there were no federal transactions involving mineral rights. Respondent has failed to show how the ownership of third party mineral rights bears at all upon this federal regulatory program, much less heavily.

B. Federal Common Law May Only Be Applied Where There is a Significant Conflict Between a Genuinely Identifiable Federal Policy or Interest and State Law

Respondent asserts that there is a legitimate federal interest in ensuring that the terms of land acquisitions are not changed after the fact (Opp. 9). This statement is correct; it was the basis of the holding in ***Little Lake***. However, it is totally inapplicable to the instant case. Petitioners do not wish to change the terms of any land acquisition contract. There was never a contract between the United States and the mineral owner – petitioners' ancestor-in-title.

In ***Little Lake***, this Court specifically deferred until another day one of the exact issues before the Court in this case: the application of Act 315 of 1940 to an unrestricted mineral servitude either created in an act of transfer to the Government or which pre-existed the acquisition by the Government in favor of a third party. In distinguishing such cases, this Court noted:

> Were the terms of the mineral reservations at issue here less detailed and specific, it might be said that the Government acknowledged and intended interest to be bound by unforeseeable changes in state law.

Little Lake, *supra*, at 602-603. (*A fortiori*, the Government should be bound by foreseeable changes in state law (Pet. 14).) This statement recognized implicitly that when the Government acquires property rights in a particular state, it does so against the background of the entire *lex loci*, including changes to rules of prescription. The Court of Appeals ignored this Court's caveat above and extended the rule of ***Clearfield Trust Co. v. United States***, 318 U.S. 363 (1943), well beyond the limited contractual application that this Court intended in ***Little Lake***.

Respondent asserts that no inquiry was made in ***Little Lake*** as to whether some specific provision of the Migratory Bird Conservation Act was interfered with or undermined by third party mineral ownership (Opp. 9 n. 4).

This is correct. The federal policy or interest found there was "the general importance of certainty and finality under land acquisition programs" (Opp. 9 n. 4). But here, there is no such federal interest of "general importance." There is no contract affecting minerals which needs certainty or finality. In any event, any purchase of land in Louisiana subject to outstanding mineral rights of necessity creates uncertainty. The landowner can never be certain whether the mineral owner will, by inaction, allow the minerals to prescribe, or be certain that the legislature will not repeal or modify the rule of prescription.

In ***Little Lake***, Act 315 of 1940 ran afoul of federal interests because the plaintiff sought its application "to a consumated land transaction under a contract which specifically defined conditions for prolonging the vendor's mineral reservation," and said application "deprives it [the United States] of bargained-for contractual interests." ***Little Lake***, *supra*, at 598. In this case, the United States entered into no similar contract.

The Court of Appeals "judicially constructed" an issue of general importance – "the application of default legal rules in place at the time of contract" (Pet. 11a). However, as clearly shown in our Petition, it makes no logical or legal sense for this to be a federal interest. (Pet. 13-15). In fact, respondent apparently concedes that there is no such federal interest of general importance – "default rules do not necessarily favor the United States" (Opp. 9). In any event, the United States has never shown the basis for such purported interest. Likewise, the United States has never argued the existence of such interest in this case.

No general policy or interest is applicable in the instant case. Therefore, if there is a federal policy or interest it must be based on specific facts of this case. The only possible evidence in this regard is language found in an appraisal report and in two of the land acquisition agreements, as we stated in our Petition (Pet. 16-17). Respondent basically admits this fact – this is the only evidence to which it refers (Opp. 8). But such evidence does not even tend to prove, much less establish as an undisputed

summary judgment fact, that there was a federal interest in the instant third party mineral rights.

There is no evidence in the record that the United States showed or discussed its appraisal with anyone. How could an internal appraisal create in the United States an interest in third party mineral rights? The appraisal simply showed that the United States recognized that the outstanding mineral rights had value. (No one has ever disputed this fact.) The Government is arguing that because it valued a third party's mineral rights, such mineral rights became subject to federal common law. Such an argument falls of its own weight.

The language in the two acquisitions, affecting only a small amount of the acreage in dispute, by which the United States purported to grant Gulf Lumber Company reversionary rights in mineral rights owned by S. H. Fullerton (petitioners' ancestor-in-title) certainly could not give the United States a federal interest in those minerals. How can a contract between the United States and Gulf Lumber Company purporting to affect the mineral rights of a third party give the United States a federal interest in those mineral rights?

Even if one looks only to the documents relied upon by the United States, there is no federal interest in these third party mineral rights. Absent an actual federal interest, state law must apply. In any event, this matter was presented on summary judgment. Petitioners presented voluminous evidence to show that the purported federal interest did not exist (Pet. 4, 16-17). The existence of the purported federal interest is not an undisputed material fact. What law should be applied is at least in dispute.

CONCLUSION

Despite the Court of Appeals' decision and the Government's protests, the decision herein is not foreclosed by the decision in ***Little Lake***. This case involves issues specifically not addressed in that decision. These important issues of federal law should be resolved by this Court.

For the reasons set forth in the Petition for Writ of Certiorari and in this Reply Brief, this Court should grant a writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

A. J. Gray, III
Counsel of Record
THE GRAY LAW FIRM (APLC)
Post Office Box 1467
Lake Charles, Louisiana 70602
Telephone: (337) 494-0694

Kim G. Mayhall
Thomas C. McKowen, IV
STRAIN, DENNIS, MAYHALL & BATES, L.L.P.
318 St. Charles Street
Baton Rouge, Louisiana 70802
Telephone: (225) 343-0100

Thad D. Minaldi
JACK LAWTON, INC.
101 N. Huntington Street
Sulphur, Louisiana 70663
Telephone: (337) 527-5221

Attorneys for Petitioners